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Mowing Down a Grass Roots Movement But Protecting the Crabgrass: Congressional Term Limits Are Unconstitutional

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CASENOTE

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I. INTRODUCTION

On November 3, 1992, Arkansas voters approved an amendment to the Arkansas Constitution that limited their U.S. representatives having served more than three terms and their U.S. senators having served more than two terms from ever again obtaining ballot access for the same office.[1] The fate of the measure, Amendment 73, was quickly thrust into

1. Amendment 73 reads, in pertinent part:

Preamble: The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties

the hands of the judiciary when a lawsuit was filed just ten days after the election.[2] Two years later, the U.S. Supreme Court heard the case,[3] and settled debate over a political principle as old as the republic itself: Congressional term limits are unconstitutional.[4]

U.S. Term Limits, Inc. v. Thornton[5] began in Circuit Court in Pulaski County, Arkansas.[6] The Arkansas League of Women Voters and Bobbie Hill[7] sued the State Board of Election Commissioners, Arkansas' incumbent U.S. senators and representatives, incumbent state legislators and constitutional officers, and Arkansas' Republican and Democratic parties.[8] The plaintiffs alleged that Amendment 73 violated the Qualifications Clauses of the U.S. Constitution[9] by imposing a quali-

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> as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.
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> . . . .
>
> § 3 Congressional Delegation.
>
> (a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.
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> (b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

ARK. CONST. amend. 73.

The measure also imposed *term* limitations, as opposed to *ballot access* limitations, on various state officeholders. *Id.* amend. 73, §§ 1-2. Those limits were challenged unsuccessfully at the state trial and supreme court level. U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994) (*Hill*); U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1846 n.1 (1995) (*U.S. Term Limits*). Additionally, the case presented state constitutional law issues neither considered by the U.S. Supreme Court nor discussed here. *Hill*, 872 S.W.2d at 354-55, 357-59, 360-61; *see also U.S. Term Limits*, 115 S. Ct. at 1846 n.1.

2. *Hill*, 872 S.W.2d at 352.

3. *Id.* at 349, *cert. granted sub nom.* U.S. Term Limits, Inc. v. Thornton, 114 S. Ct. 2703 (1994).

4. *U.S. Term Limits*, 115 S. Ct. at 1842.

5. *Id.*

6. *Hill*, 872 S.W.2d at 352.

7. Hill alleged she was a political supporter of John Dawson, a member of the Arkansas House of Representatives, who had served seven prior terms there. *Id.* at 353.

8. *Id.*

9. The Qualifications Clauses provide: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and have been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen;" U.S. CONST. art. I, § 2, cl. 2. "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen." *Id.* § 3, cl. 3.

fication not contained therein for these two federal offices.[10] The State of Arkansas and other organizations supporting the measure, including U.S. Term Limits, Inc., intervened as defendants.[11] The complaint was then amended to name as a plaintiff Dick Herget, a supporter of U.S. Representative Ray Thornton of Arkansas.[12]

On cross-motions for summary judgment,[13] the trial judge granted declaratory relief, invalidating Amendment 73.[14] The Arkansas Supreme Court affirmed, holding that the ballot access limits for members of Congress violated the Qualifications Clauses.[15] The State of Arkansas and other defendants then successfully petitioned the U.S. Supreme Court for a writ of certiorari.[16] On May 22, 1995, the Court affirmed, holding Arkansas' congressional ballot access limits unconstitutional. *U.S. Term Limits, Inc.*, 115 S. Ct. 1842 (1995).

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10. *Hill*, 872 S.W.2d at 352. The plaintiffs also alleged that § 3 was not severable and that its unconstitutionality thus voided the entire amendment. They also claimed that the absence of an enacting clause in Amendment 73 violated Amendment 7 of the state constitution. *Id.* at 352-53. The plaintiffs also asserted that Amendment 73 was unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. Brief for the State Petitioner at 4, *U.S. Term Limits* (Nos. 93-1456 and 93-1828). The Pulaski County Circuit Court held that Amendment 73 did not offend either amendment. *Hill*, 872 S.W.2d at 359. The Arkansas Supreme Court addressed the First and Fourteenth Amendment issues only with regard to term limits for state officeholders, and affirmed the Circuit Court's decision on this point. *Id.*

11. *Hill*, 872 S.W.2d at 353. The other intervenors were Americans for Term Limits and Arkansans for Governmental Reform. *Id.*

12. *Id.* Thornton had served three previous terms in the U.S. House of Representatives. *Id.*

13. As summarized by the Arkansas Supreme Court:

> Appellees Hill and Herget joined by U.S. Congressman Ray Thornton and the State Democratic Party moved for summary judgment to void Amendment 73 in accordance with the Amended Complaint. [Several unified state legislators] filed a similar motion. The State of Arkansas and Arkansans for Governmental Reform moved to Dismiss the complaint for lack of justiciability. Intervenor U.S. Term Limits moved for summary judgment on grounds that Amendment 73 was valid in all respects.

Id.

14. *Id.* The trial judge based his decision primarily on the absence of an enacting clause within Amendment 73. *Id.* In addition, the court held that § 3 violated the Qualifications Clauses of the U.S. Constitution. *Id.*

15. *Id.* at 349. The *Hill* court was terribly fractured, with no majority opinion. Three justices formed a plurality, and two more concurred in part and dissented in part. These five held that Amendment 73's congressional ballot access provisions were unconstitutional. *Id.* at 351-61 (plurality opinion of Robert Brown, J.), 361-63 (Gerald Brown, Special J., concurring in part and dissenting in part), 363-66 (Dudley, J., concurring in part and dissenting in part). Two more justicies separately concurred in part and dissented in part, concluding that the ballot access provisions were constitutional. *Id.* at 367-68 (Hays, J., concurring in part and dissenting in part) 368-70 (George K. Cracraft, Special C.J., concurring in part and dissenting in part). All references in this Note to *Hill* are to the plurality opinion, unless otherwise specified.

Four of the Arkansas Supreme Court justices did not participate in the decision, *id.* at 361, recusing themselves without explanation. David Heckelman, *3 Justices Should Have Recused on Term Limits: Quinn*, CHI. DAILY L. BULL., Sept. 8, 1994, at 1.

16. U.S. Term Limits, Inc. v. Thornton, 114 S. Ct. 2703 (1994).

This Note analyzes the history of and debate over congressional term limits and, more specifically, the provision at issue in *U.S. Term Limits*. Part II chronicles the congressional term limits movement, from revolutionary America through the establishment of our current system of government, concluding with its current status. Part III examines the legal foundations of congressional term limits, focusing primarily on cases to which the Supreme Court attached significance in deciding *U.S. Term Limits*. Parts IV and V analyze and critique *U.S. Term Limits* and offer a short commentary on the future of the term limits movement in light of this decision.

II. PERSPECTIVE

While term limits may appear to most people to be a recent political phenomenon, they are, in fact, not new to America or even democratic government. Historically known as "rotation in office,"[17] term limits were first established in Greece[18] and Rome.[19] More importantly, however, they were embraced by America's first national government.

A. *History of Congressional Term Limits in America*

1. THE CONTINENTAL CONGRESS

The Articles of Confederation limited members of the Continental Congress to serving only three years in the space of any six.[20] By 1784, three years after the Articles were implemented, several delegates had exceeded their allowed terms, although not all were forced from office.[21]

In this first American government, the states voluntarily ceded a limited amount of sovereignty,[22] whereas the people directly granted

17. JAMES K. COYNE & JOHN H. FUND, CLEANING HOUSE: AMERICA'S CAMPAIGN FOR TERM LIMITS 110 (1992).

18. *Id.* (citing Mark Petracca, Rotation in Office: The History of an Idea (paper prepared for a conference at the Rockefeller Institute of Government at SUNY-Albany, Oct. 1991)).

19. Robert Struble, Jr. & Z.W. Jahre, *Rotation in Office: Rapid but Restricted to the House*, POLITICAL SCIENCE AND POLITICS, 37 n.7 (Mar. 1991).

20. ARTS. OF CONFEDERATION art. V, cl. 2. Although passed in 1777, this provision did not become effective until 1781 when the Articles were finally ratified. JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 218 (1979).

21. Massachusetts' Samuel Osgood was forced to resign under protest. EDMUND C. BURNETT, THE CONTINENTAL CONGRESS 605 (1941). Two members from Delaware were expelled for violating the provision. *Id.* Two members of the Rhode Island delegation were also challenged for violating the provision, and their objections led to vociferous debate. *Id.* at 605-06. James Monroe remarked, "I never saw more indecent conduct in any assembly before." *Id.* at 606. Ironically, the Rhode Islanders were allowed to remain because the Congress needed their presence to conduct business. *Id.*

22. Under the Articles of Confederation, the states were guaranteed their sovereignty and the Continental Congress had no power to force the states to obey its resolutions. ARTS. OF

power to create our present federal government.[23] Although term limitations were included in the Articles of Confederation,[24] the states were sharply divided on the idea of rotation of office.[25] It had "worked very badly"[26] in the Continental Congress by forcing some men from office, such as James Madison, just when their talents were emerging.[27] Although this was not the reason the states sent delegates to Philadelphia to reform the Articles,[28] term limits were excluded from the renowned product of their efforts, the Constitution.

2. THE CREATION OF THE CONSTITUTION

a. The Constitutional Convention

Rotation of office was included in, but quickly removed from, the Constitutional Convention's first working paper, the Virginia Plan.[29] The second draft of the Constitution retained this omission,[30] and apparently no one ever formally suggested any further form of congressional term limitation. The final version of the Constitution did not include

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CONFEDERATION art. II; CLINTON ROSSITER, 1787: THE GRAND CONVENTION 48-52 (1987); *see also U.S. Term Limits*, 115 S. Ct. at 1855 (Under the Articles of Confederation, "the States retained most of their sovereignty, like independent nations bound together only by treaties.") (citing Wesberry v. Sanders, 376 U.S. 1, 9 (1964)).

23. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403-04 (1819):

> The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

24. *See supra* note 20 and accompanying text.

25. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 613 (1928).

26. *Id.*

27. *Id.*

28. The Philadelphia assembly was called to reform the Articles of Confederation by strengthening the Continental Congress, although Madison and some others intended to construct a new government entirely. *See, e.g.*, ROSSITER, *supra* note 22, at 169.

29. 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 143-44, 153 (Jonathan Elliot ed., 2d ed. 1888) [hereinafter ELLIOT'S DEBATES]. Offered by Edmund Randolph on May 29, 1787, the Virginia Plan provided that members of what became the House of Representatives would be "incapable of reelection for the space of after the expiration of their term of service . . . ." 1 *id.* at 143-44 (space intentionally left blank). However, on May 31, that provision and others were removed as being "too . . . detail[ed] for general propositions." 5 *id.* at 137. The motion carried unanimously without any record of debate. Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of The Constitutionality Of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341, 347 (1991); *see also U.S. Term Limits*, 115 S. Ct. at 1859 n.22 (noting no record of debate on either the proposal or its excision).

30. 5 ELLIOT'S DEBATES 376-81.

any term limit provision, even though thirty-two of its thirty-nine signatories had served in the Continental Congress and were presumably aware of the Articles' rotation of office scheme.[31]

b. The Ratification Process

Rotation in office received more attention in the battle over ratification than in the convention. Some Anti-Federalists[32] opposed the Constitution partly because of the exclusion of term limits. They feared that members of Congress would perpetually be reelected and lose touch with the people.[33] William Findley railed against the Constitution, concluding that "[r]otation, that noble prerogative of liberty, is entirely excluded from the new system of government, and the great men may and probably will be continued in office during their lives."[34]

At least three state ratifying conventions requested that some form of congressional rotation of office be included in the Constitution. New York proposed limiting senators to six years of service within any twelve.[35] Virginia and North Carolina both suggested a rotation principle be endorsed in a constitutional amendment.[36]

Conversely, Robert R. Livingston argued at the New York ratifying convention that

> rotation is an absurd species of ostracism—a mode of proscribing eminent merit, and banishing from stations of trust those who have filled them with the greatest faithfulness. . . . The acquisition of abilities is hardly worth the trouble, unless one is to enjoy the satisfaction of employing them for the good of one's country. We all know that experience is indispensably necessary to good government. Shall we, then, drive experience into obscurity?[37]

The authors of the Federalist Papers responded to the Anti-Federalists' cries by arguing that the regular, biennial elections imposed upon the House of Representatives accomplished the same end[38] by ensuring

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31. AMERICAN ENTERPRISE INSTITUTE, LIMITING PRESIDENTIAL AND CONGRESSIONAL TERMS 6 (1979).

32. Those in favor of ratification called themselves Federalists while their opponents were known as Anti-Federalists. *See, e.g.*, ROSSITER, *supra* note 22, at 278-79.

33. *See, e.g.*, 2 ELLIOT'S DEBATES 286-91.

34. William Findley, *Letter of an Officer of the Late Continental Army, Nov. 3, 1787, in* ANTI-FEDERALISTS VERSUS FEDERALISTS: SELECTED DOCUMENTS 135 (John D. Lewis ed., 1967).

35. 1 ELLIOT'S DEBATES 330.

36. 3 *id.* at 657-58 and 4 *id.* at 243, respectively.

37. 2 *id.* 293.

38. Of course, neither frequency nor popular election were available in the Senate, where members originally were selected by their respective state legislatures for six-year terms. *See* U.S. CONST. art. I, § 3, cl. 2. Madison argued this structure was necessary to prevent "an unenlightened and variable policy," and "particular moments in public affairs when the people, stimulated by some irregular passion or some illicit advantage . . . may call for measures which

a close bond between citizens and their legislators.

> As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people. *Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.*[39]

As with their other complaints about the Constitution, the Anti-Federalists saw their grievances about the absence of rotation provisions slighted when states ratified the Constitution as proposed. Although some state ratifying conventions proposed term limits amendments, none of the twelve amendments approved by the first Congress and put before the states for ratification included any mandate of rotation of office.[40]

3. TERM LIMITS IN CONGRESS

The push for rotation of office continued into the first Congress. In 1789, Representative Thomas Tucker of South Carolina proposed limits on both House and Senate terms.[41] Since that time, term limits proponents have sporadically introduced such bills, with a flurry thereof in recent decades.[42] House members apparently proposed Senate rotation requirements in 1896, 1904, and 1906.[43] The first floor vote on congressional term limits came in 1947 while Congress was debating the presidential term limit that became the Twenty-Second Amendment. Senator W. Lee O'Daniel of Texas proposed a single six-year term for the President, Vice-President, and both houses of Congress. His proposal was

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they themselves will afterwards be the most ready to lament and condemn." THE FEDERALIST NO. 63, at 382, 384 (James Madison) (Clinton Rossiter ed., 1961). He also argued corruption of the Senate was implausible because the House, state legislatures, and the people vicariously transmitting their will through both would provide a check on the Senate. *Id.* at 387-88. The *Federalist* papers ignored the issue of congressional rotation of office. Troy A. Eid & Jim Kolbe, *The New Anti-Fedederalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 DENV. U. L. REV. 1, 17 (1992).

39. THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). Recognizing the flip-side, Madison conceded that "[a] few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and perhaps, not unwilling to avail themselves of those advantages." *Id.* No. 53, at 335.

40. Eid & Kolbe, *supra* note 38, at 22.

41. 1 ANNALS OF CONG. 761 (Joseph Gales ed., 1789). The House never voted on Tucker's proposal. SULA P. RICHARDSON, CONGRESSIONAL RESEARCH SERVICE NO. 89-537 CONGRESSIONAL TENURE: A REVIEW OF EFFORTS TO LIMIT HOUSE AND SENATE SERVICE 4 (1989).

42. More than 75% of these proposals have been submitted since 1970. AMERICAN ENTERPRISE INSTITUTE, *supra* note 31, at 9.

43. RICHARDSON, *supra* note 41, at 4 n.12. These proposals are not well documented and confusion exists as to their exact nature. *Id.* None of these proposals were voted upon. *Id.* at 4.

defeated 82 to 1.[44] House and Senate members have introduced numerous term limits in every Congress since 1975, reaching previous highs of twelve in the 95th[45] and 103rd[46] Congresses. Before 1995, none were given serious consideration.[47]

Following the 1994 elections, prospects for congressional action on term limits appeared better than ever. As a part of their "Contract with America," more than 300 Republican candidates for the House of Representatives declared their intent to vote on congressional term limits in the first 100 days of the 104th Congress.[48] When the Republicans gained control of Congress,[49] hopes were high for passage of an amendment.[50] Those hopes proved futile.

At least 25 bills or constitutional amendment proposals have been filed in the House during the 104th Congress.[51] One garnered a major-

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44. 93 CONG. REC. 1962-63 (1947); *see also* GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS, AND THE RECOVERY OF DELIBERATIVE DEMOCRACY 187-89 (1992).

45. RICHARDSON, *supra* note 41, at 7.

46. S.J. Res. 12, 103d Cong., 1st Sess. (1993); S.J. Res. 18, 103d Cong., 1st Sess. (1993); S.J. Res. 33, 103d Cong., 1st Sess. (1993); S.J. Res. 34, 103d Cong., 1st Sess. (1993); H.R.J. Res. 31, 103d Cong., 1st Sess. (1993); H.R.J. Res. 71, 103d Cong., 1st Sess. (1993); H.R.J. Res. 77, 103d Cong., 1st Sess. (1993); H.R.J. Res. 164, 103d Cong., 1st Sess. (1993); H.R.J. Res. 203, 103d Cong., 1st Sess. (1993); H.R.J. Res. 221, 103d Cong., 1st Sess. (1993); H.R.J. Res. 298, 103d Cong., 1st Sess. (1993); H.R.J. Res. 339, 103d Cong., 2d Sess. (1994). Author search of LEXIS, Legislation Library, Bills File.

47. JAMES L. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 73-74 (1992). None of the twelve term limits bills introduced in the 103rd Congress were debated, even in subcommittee. Kevin Merida, *Term Limit Proposal Likely Faces an Uphill Fight*, THE BERGEN REC., Jan. 3, 1995, at A11. In 1994, Senator Hank Brown offered a term limit amendment to a bill to reform congressional campaign financing. His amendment was defeated by a vote of 57 to 39. *Id.*

48. David Hess, *GOP Candidates Sign 'Contract' of Promises*, MIAMI HERALD, Sept. 28, 1994, at 7A. In addition, U.S. Term Limits, Inc. asked 1994 congressional candidates to sign two pledges: one to vote for a congressional term limit constitutional amendment; and a second to oppose any effort to alter state-enacted congressional term limit laws. Of those elected who had signed these pledges, six violated the first, and 61 broke the latter, voting for a bill which would have imposed a 12-year limitation on House service, longer than most states enacted. *104th Congress: 1994 Pledge Breakers*, Dec. 12, 1995, *available on* Congressional and State Term Limits Homepage of the Internet, at http://www.termlimits.org/violators104.shtml.

49. Evan Thomas & Rich Thomas, *A Guide to the First 100 Days*, NEWSWEEK, Jan. 9, 1995, at 21.

50. Jonathan Alter, *Decoding the Contract*, NEWSWEEK, Jan. 9, 1995, at 26. However, only Republican House candidates signed the contract, not Senate candidates. And the contract only promised a vote, not passage of its proposals. David Hess, *GOP's Contract Faces Reality Check by Edgy Lawmakers*, MIAMI HERALD, Dec. 4, 1994, at 13A. Some representatives wavered early. Congressman Dick Armey hinted that Republicans might back away from their promise because with Republicans controlling Congress, the public might no longer want congressional term limits. *GOP Suddenly Not So Keen on Term Limits*, MIAMI HERALD, Nov. 22, 1994, at 7A. House Republicans were divided on whether the House limits should be three or six terms. Steve Daley, *With Mixed Feelings, GOP Tackles Term Limits*, CHI. TRIB., Mar. 15, 1995, at 8.

51. H.R. 850, 104th Cong., 1st Sess. (1995); H.R. 1104, 104th Cong., 1st Sess. (1995); H.R.J. Res. 2, 104th Cong., 1st Sess. (1995); H.R.J. Res. 3, 104th Cong., 1st Sess. (1995); H.R.J. Res. 8,

ity,[52] but not the required two-thirds approval.[53] Senators filed six proposals,[54] but in October 1995 tabled the one bill that reached the floor for reconsideration this spring.[55] Senators even defeated a nonbinding "sense of the Senate" resolution pledging to enact term limits.[56]

B. *Congressional Term Limits in America Today*

Citizens in twenty-one states have imposed term or ballot access limits on their congressional delegations through voter initiatives and two state legislatures have done so on their own.[57] Colorado was first in 1990, limiting its U.S. senators and representatives to twelve consecutive years in office.[58] In 1991, Washington voters became the first to reject congressional term limits by voting down a proposal to, in part,

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104th Cong., 1st Sess. (1995); H.R.J. Res. 9, 104th Cong., 1st Sess. (1995); H.R.J. Res. 12, 104th Cong., 1st Ses. (1995); H.R.J. Res. 24, 104th Cong., 1st Sess. (1995); H.R.J. Res. 25, 104th Cong., 1st Sess. (1995); H.R.J. Res. 29, 104th Cong., 1st Sess. (1995); H.R.J. Res. 34, 104th Cong., 1st Sess. (1995); H.R.J. Res. 38, 104th Cong., 1st Sess. (1995); H.R.J. Res. 39, 104th Cong., 1st Sess. (1995); H.R.J. Res. 44, 104th Cong., 1st Sess. (1995); H.R.J. Res. 52, 104th Cong., 1st Sess. (1995); H.R.J. Res. 65, 104th Cong., 1st Sess. (1995); H.R.J. Res. 66, 104th Cong., 1st Sess. (1995); H.R.J. Res. 73, 104th Cong., 1st Sess. (1995); H.R.J. Res. 75, 104th Cong., 1st Sess. (1995); H.R.J. Res. 76, 104th Cong., 1st Sess. (1995); H.R.J. Res. 77, 104th Cong., 1st Sess., (1995); H.R.J. Res. 82, 104th Cong., 1st Sess. (1995); H.R.J. Res. 91, 104th Cong., 1st Sess. (1995); H.R.J., Res. 92, 104th Cong., 1st Sess. (1995). Author search of LEXIS, Legislation Library, Bills file. Two bills brought up for a vote "became four competing bills on the House floor—a sign that the leadership wanted lots of political cover by [sic] nothing to pass." *Paul Jacob's August 1995 Message*, Dec. 12, 1995, *available on* Congressional & State Term Limits Homepage of the Internet, at http://www.termlimits.org/jacobsmess.shtml.

52. *Senate Rejects Proposal To Endorse Term Limits*, L.A. TIMES, Oct. 18, 1995, at A20. The March 1995 House vote was more than 60 votes short of the two-thirds required for passage. *Id.*

53. *See* U.S. CONST. art. V (two-thirds vote required in both houses of Congress to submit constitutional amendments to the states for ratification).

54. S. 271, 104th Cong., 1st Sess. (1995); S. 272, 104th Cong., 1st Sess. (1995); S. 683, 104th Cong., 1st Sess. (1995); S.J. Res. 19, 104th Cong., 1st Sess. (1995); S.J. Res. 21, 104th Cong., 1st Sess. (1995); S.J. Res. 36, 104th Cong., 1st Sess. (1995).

55. *Senate Rejects Proposal*, *supra* note 52. The proposal was at least 20 votes short of two-thirds at the time. *Id.*

56. *Id.* This proposal was rejected by a vote of 49 to 45. *Id.* However, 62% of those Senators up for re-election in 1996 voted in its favor. *TL Sense of Senate Fails*, Dec. 12, 1995, *available on* Congressional and State Term Limits Homepage of the Internet, at http://www.termlimits.org/sensense95.shtml.

57. Grover G. Norquist, *A Limited Future*, THE AMERICAN SPECTATOR, Aug. 1995, *available in* LEXIS, News Library, MAGS file. The breadth of the *U.S. Term Limits* holding certainly invalidates all of these term limitations. *See U.S. Term Limits*, 115 S. Ct. at 1909 (Thomas, J., dissenting).

In addition, the South Dakota and Utah state legislatures have petitioned Congress for a constitutional convention to propose a term limit amendment, pursuant to Article V of the U.S. Constitution. H.R.J. Res. 1001, 64th Sess., 1989 S.D. Laws; S.J. Res. 24, 48th Sess. 1990 Utah Laws; *see also* U.S. CONST. art. V ("[O]n the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments. . . .").

58. COLO. CONST. art. XVIII, § 9a(1).

limit their representatives to three consecutive terms and their senators to two consecutive terms.[59] One year later, however, Washington's citizens approved an initiative that placed ballot access limits, instead of the earlier, rejected term limits, on its congressional delegation.[60] That same day, Arkansas voters passed proposed Constitutional Amendment 4,[61] resulting in the litigation forming the basis of this Note.

III. LEGAL FOUNDATIONS

The U.S. Supreme Court did not have occasion until *U.S. Term Limits* to decide whether congressional term or ballot access limits were constitutional. The Court, however, had previously considered several of the key issues in *U.S. Term Limits*, including the concept of federalism and various impediments to the ballot or elected office.[62] In addition, one lower federal court and several state panels had previously examined term or ballot access limitations on congressional and state candidates under both state and the federal constitutions.[63]

Since proposals for congressional term limits began gaining momentum earlier this decade, speculation ran high on the constitutional and legal theories the Court would use to determine their fate.[64] Surprisingly, the majority in *U.S. Term Limits* opted to base its decision invalidating Arkansas' Amendment 73 not on the weight of judicial authority as many expected, but instead almost exclusively on *historical* authority.

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59. Timothy Egan, *State of Washington Rejects A Plan to Curb Incumbents*, N.Y. TIMES, Nov. 7, 1991, at B16. The proposal was rejected by a vote of 54% to 46%. *Id.* In 1994, Utah voters rejected a congressional term limit proposal to modify limits previously passed by their state legislature. Tony Semerad, *Term Limits Aren't Dead*, SALT LAKE TRIBUNE, Nov. 10, 1994, *available in* LEXIS, News Library, SLTRIB file.

60. WASH. REV. CODE ANN. §§ 29.68.015-.016 (West Supp. 1994). Those affected would be House members having served six years in any 12 and Senators having served 12 years in any 18. *Id.*

61. The vote tally was 494,326 in favor, 330,836 opposed. *Hill*, 872 S.W.2d at 351.

62. *See infra* notes 66-121 and accompanying text.

63. In addition to the *Hill* court, one federal district court and several state courts have considered and issued decisions on congressional and state term limitations. *See, e.g.*, Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994) (Washington's congressional ballot access law unconstitutional), *aff'd sub nom.* Thorsted v. Munro, No. 94-35222 *et seq.*, 1996 WL 39389 (9th Cir. Jan. 30, 1996); Stumpf v. Lau, 839 P.2d 120, 123 (Nev. 1992) (proposed congressional term limit measure " 'palpably' " unconstitutional); Legislature v. Eu, 816 P.2d 1309 (Cal. 1991) (term limits for state officeholders constitutional), *cert. denied*, 503 U.S. 919 (1992); State *ex rel.* Maloney v. McCartney, 223 S.E.2d 607 (W.Va. 1976) (term limitation on governor constitutional), *appeal dismissed sub nom.* Moore v. McCartney, 425 U.S. 946 (1976); Maddox v. Fortson, 172 S.E.2d 595, 598-99 (Ga. 1970) (term limitations on state offices constitutional), *cert. denied*, 397 U.S. 149 (1970).

64. *See, e.g.*, Eid & Kolbe, *supra* note 38; Tiffanie Kovacevich, *Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?*, 23 PAC. L.J. 1677 (1992); Gorsuch & Guzman, *supra* note 29; Roderick M. Hills, Jr., *A Defense Of State Constitutional Limits On Congressional Terms*, 53 U. PITT. L. REV. 97 (1991).

Nonetheless, the significance of prior cases cannot be disregarded. In that the three opinions in *U.S. Term Limits*, together with the potential for a reversal of this five-to-four decision,[65] make these cases relevant, they are briefly discussed to make the reader aware of their possible future significance in similar litigation.

A. Powell v. McCormack

In 1969, the Supreme Court handed down what all but became the dispositive case in *U.S. Term Limits*: *Powell v. McCormack*.[66] At issue was whether the House of Representatives could exclude Adam Clayton Powell, a duly elected Congressman from New York, from the 90th Congress.[67] The House had voted in 1967 to exclude Powell for a variety of alleged unethical acts under its constitutional authority to judge the qualifications of its members.[68] Powell then filed suit, alleging that because he met each of the three qualifications for service in the House specified in Article I of the Constitution, the House lacked authority to refuse to seat him.[69]

Chief Justice Earl Warren, writing for an eight-to-one majority,[70] held that the House was "without authority to *exclude* any person, duly

65. Although *U.S. Term Limits* holds without reservation that congressional term limits can only be enacted through an amendment to the U.S. Constitution, it remains possible that Justice Stevens' majority opinion could be challenged, particularly should the makeup of the Court change. Justice Stevens is the Court's oldest member at age 75. Timothy M. Phelps, *Judicial Revolution: Recent Cases Reveal Slant Toward States*, NEWSDAY, May 29, 1995, at A13.

Moreover, even with no significant change in membership, the Court has been known to overrule its own precedent, particularly with regard to federal and state power issues. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976); *compare* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (Court upholding the National Labor Relations Act and, without explicitly overruling *Schecter*, backing away from *Schecter*'s "direct/indirect effects" test of Congress' Commerce Clause authority).

Additionally, pro-term limits groups have vowed not to give up the fight. Beyond pushing for a constitutional amendment, some plan a variety of strategies to force the issue, which will likely lead to court challenges. *See infra* note 281. In the area of abortion, similar efforts by anti-abortion groups resulted in the Court chipping away at its landmark ruling in Roe v. Wade, 410 U.S. 113 (1973), as states passed laws tinkering with Roe's "fundamental right" to abortion. *Compare* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) *with* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (similar state laws struck down in *Thornburgh* later upheld in *Planned Parenthood*). *See also* Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV 683 (1992) (discussing this development in abortion jurisprudence).

66. 395 U.S. 486 (1969).

67. *Id.* at 489.

68. *Id.* at 489-93, 495. *See* U.S. CONST. art. I, § 5, cl. 1 ("[e]ach house shall be the judge of the elections, returns, and qualifications of its own members").

69. *Powell*, 395 U.S. at 489. See *supra* note 9 for the text of the clause.

70. Justice Potter Stewart dissented, believing the issue moot because Powell was seated in the following Congress after being reelected. *Powell*, 395 U.S. at 559-74 (Stewart, J., dissenting).

elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[71] In reaching its decision, the Court examined the Qualifications Clauses, their precursors in England and colonial America, the Constitutional Convention-era debate, and congressional interpretation of the clauses.[72] The breadth of the Court's opinion implied that the sole requirements for House membership were listed in the Qualifications Clauses, and that these requirements could be altered or added to only by constitutional amendment.[73]

B. *Cases Involving Issues of Federalism*

In *U.S. Term Limits*, Justice Anthony Kennedy eloquently described federalism as

> our Nation's own discovery. The Framers split the atom of sovereignty. . . . The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[74]

This concept of divided power and accountability between the state and federal governments is implicit within the U.S. Constitution.[75] It is also affirmatively expressed in the Tenth Amendment, which proclaims that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved by it to the States respectively, or to the people."[76] Indeed, strong constitutional support for state-enacted congressional term limits has been claimed to derive from the Tenth Amendment.[77] The Supreme Court attached limited signifi-

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71. *Id.* at 522 (majority opinion).

72. *Id.* at 523-47.

73. *See* Erik H. Corwin, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 580-82 (1991).

74. 115 S. Ct. at 1872 (Kennedy, J., concurring).

75. "Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers 'herein granted' by the rest of the Constitution." United States v. Lopez, 115 S. Ct. 1624, 1646 (1995) (Thomas, J., concurring) (citation omitted).

76. U.S. CONST. amend. X.

77. The meaning of the Tenth Amendment with regard to states imposing additional qualifications on their members of Congress was debated early on by Thomas Jefferson and Justice Joseph Story, though not specifically with regard to limiting congressional terms. Jefferson believed that while the question was one "on which honest men may differ," the states may have such power because it was neither exclusively granted to Congress nor denied to the states in the Constitution. Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814), *in* THE BEST LETTERS OF THOMAS JEFFERSON 194 (Joseph Gregoire de Roulhac Hamilton ed., 1926). Justice Story disagreed, believing that the Tenth Amendment only reserved to the states those powers they had prior to the adoption of the Constitution. Because the U.S. Congress sprung from the Constitution, the states had no prior powers to regulate its members' qualifications. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 625-27 (5th ed.,

cance to this Amendment over the years,[78] at one point casting it aside as "but a truism."[79] Recently, however, the Court has recognized the amendment as protecting legitimate state interests from unwarranted federal interference, beginning in 1976 with *National League of Cities v. Usery*.[80] Since *National League of Cities*, the Court has seized upon the concept of federalism to invalidate several congressional acts as unconstitutionally infringing upon state sovereignty.[81] However, because the Court's recent Tenth Amendment jurisprudence dealt with congressional

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1891). At oral argument in *U.S. Term Limits*, Justice Scalia offered that the disagreement between these two esteemed authorities made the issue "very close." Transcript of Oral Argument at 18, *U.S. Term Limits* (1994 WL 714634) (Nov. 29, 1994); *see Supreme Court Hears Arguments Over Term Limits*, THE LEGAL INTELLIGENCER, Nov. 30, 1994, *available in* LEXIS, Nexis Library, Legal News file.

78. For nearly 200 years, the court afforded the Tenth Amendment scant respect. Congress was typically offered broad powers to legislate as it pleased even when its acts limited state prerogatives, beginning with McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). In that landmark case, Chief Justice Marshall upheld Congress' creation of a national bank under the Necessary and Proper clause and denied the states the power to tax it. *Id.*; *see* U.S. CONST. art. I, § 8, cl. 18 (Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers. . . .").

Congressional power over the states was increased by the Civil War (and several successive) Amendments, all explicitly granting Congress the power to enforce same by legislation. *See* U.S. CONST. amends. XIII, XIV, XV, XIX, XXIII and XXVI. Finally, since the New Deal, Congress has relied upon its powers to regulate commerce in passing laws affecting many aspects of American life in any way related to interstate or foreign commerce, regardless of traditional state authority in the area. *See* Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress' Attempt to Federalize Crime*, 27 ST. MARY'S L. J. 151, 167-68 (1995); U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States. . . ."); *see also* United States v. Lopez, 115 S. Ct. 1624 (1995) (six opinions discussing Congress' Commerce Clause power and its effect on state power to legislate in the area).

79. United States v. Darby, 312 U.S. 100, 124 (1941).

80. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). *National League of Cities* invalidated a federal minimum wage law as applied to state employees, declaring it unconstitutionally infringed upon the states' plenary power to regulate essential state functions. 426 U.S. at 846. "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function efficiently in a federal system." *Id.* at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)). The Court revisited the issue in *Garcia*, overruling *National League of Cities* in part because its test for what amounted to "traditional governmental functions" proved unworkable, *Garcia*, 469 U.S. at 537-47, and in part because the states retained sufficient protection from federal encroachment in their ability to set voter qualifications, to have their views treated fairly due to equal Senate representation, and to obtain federal financial assistance in complying with federal mandates. *Id.* at 550-55.

81. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (striking down a federal age discrimination statute as applied to Missouri state judges subject to state mandatory retirement law); New York v. United States, 505 U.S. 144 (1992) (striking down a federal nuclear waste disposal law as unconstitutionally forcing the states to choose between two options Congress could not mandate); United States v. Lopez, 115 S. Ct. 1624 (1995) (striking down a federal law criminalizing gun possession within school zones as exceeding congressional commerce power and intruding upon the states' plenary powers).

overreaching instead of state acts affecting the federal government, its effect on measures such as Amendment 73 was uncertain.

C. *Elections Cases*

Article I, section 4 of the Constitution confers authority upon the States to regulate congressional elections.[82] Recognized as a power to erect a "complete code"[83] in this vein, term limits proponents viewed Amendment 73 as fully encompassed within this delegation.[84]

The drafters of Amendment 73 carefully phrased it so that it would limit terms for various state officeholders, but only deny ballot access to some of Arkansas' incumbent members of Congress without actually limiting their terms.[85] Of course, they did this to avoid any Qualifications Clauses challenge to the amendment's constitutionality, while at the same time likely de facto limiting terms.[86] Assuming application of *Powell* could be avoided, they presumably expected prior ballot access cases to offer Amendment 73 a constitutional safe harbor.

The leading congressional ballot access case is *Storer v. Brown*,[87] which the Supreme Court handed down in 1974. California law required that independent candidates for office had to file nomination papers within sixty days of the election, and that they could neither have voted in the preceding primary nor been registered with a political party within a year of that primary.[88] Two potential candidates for the House of Representatives who had been registered Democrats earlier in the year filed suit, alleging the law constituted an additional qualification for congressional office and violated their rights to candidacy, to political association, and to vote under the First and Fourteenth Amendments.[89] The Court denied both claims and upheld the law.[90]

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82. U.S. CONST. art. I, § 4, cl. 1: "The Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." This is known as the "Elections Clause." *See, e.g.*, *U.S. Term Limits*, 115 S. Ct. at 1869.

83. Smiley v. Holm, 285 U.S. 355, 366 (1932).

84. *See, e.g.*, Brief for the State Petitioner, *supra* note 10, at 31.

85. *Compare* ARK. CONST. amend. 73, §§ 1-2 (state officeholders) *with* § 3 (congressional delegation). *See supra* note 1.

86. In fact, two commentators signaled in 1991 that the more constitutionally prudent course would be to enact term limits, but allow incumbents to be elected by write-in votes. Those commentators based their opinions on an amendment's potential burden on the right to vote instead of on any Qualifications Clauses concerns. Gorsuch & Guzman, *supra* note 29, at 345 n.21, 375.

87. 415 U.S. 724 (1974).

88. *Id.* at 726-27.

89. *Id.* at 727-29.

90. *Id.* at 736-37.

The *Storer* Court initially examined the First and Fourteenth Amendment arguments, first determining that the law's purpose was to regulate election procedures.[91] The Court then weighed the state's interests against the infringements on the plaintiffs' First and Fourteenth Amendment rights.[92] The Court found that the law regulated "an integral part of the entire election process"[93] that "winnow[s] out and finally reject[s] all but the chosen candidates."[94] The Court said the primary structure prevented voter confusion likely to occur should defeated primary candidates run as independents in the general election.[95] These interests, the Court concluded, outweighed the plaintiffs' First and Fourteenth Amendment rights.[96]

Addressing the Qualifications Clauses argument, the majority held that the Elections Clause,[97] allowing states to regulate elections, authorized the law, because the law did not wholly prevent candidacies, but instead required candidates to choose between a party primary and an independent candidacy.[98] In a footnote, the Court dismissed the Qualifications Clauses challenge as "wholly without merit."[99]

Anderson v. Celebrezze[100] also dealt with a state's right to control ballot access in federal elections. The case concerned First and Fourteenth Amendment challenges of a presidential candidate and his sup-

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91. *See, e.g.*, Eid & Kolbe, *supra* note 38, at 48.

92. *Id.*

93. *Storer*, 415 U.S. at 735 (footnote omitted).

94. *Id.*

95. *Id.*

96. *Id.* at 736. The dissent concluded otherwise, noting independents would be forced to establish their candidacy 17 months before the general election, "an impossible burden to shoulder" in light of the two-year House term. *Id.* at 758 (Brennan, J., dissenting).

97. *See supra* note 82 for the text of the clause.

98. *Storer*, 415 U.S. at 735-36.

99. *Id.* at 746 n.16; *see also* Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984), *rev'd on other grounds*, 471 U.S. 459 (1985). Here, a hopeful candidate for the Democratic nomination for U.S. Senator from Massachusetts was kept off the ballot under a party requirement that candidates get 15% of the vote at a party convention before getting on the ballot. He argued that this amounted to an unconstitutional qualification under Article I of the U.S. Constitution. 746 F.2d at 102. In sweeping language supportive of the idea behind Amendment 73, the court wrote:

> [F]ailure to comply with the 15 percent rule does not render a candidate ineligible for the office of United States Senator. An individual is free to run as the candidate of another party, as an independent, or as a write-in candidate. If he is elected and meets the requirements of Article I, Section 3, he will be qualified to take office. . . . [T]he test to determine whether or not the "restriction" amounts to a "qualification" . . . is whether the candidate "could be elected if his name were written in by a sufficient number of electors."

Id. at 103 (in part quoting State v. Crane, 197 P.2d 864, 871 (Wyo. 1948)); *see also* Williams v. Tucker, 382 F. Supp. 381 (M.D. Pa. 1974) (upholding a "sore loser" law that denied general election ballot access to defeated congressional primary candidates wishing to run as independents, and which was challenged, in part, as a violation of the Qualifications Clauses).

100. 460 U.S. 780 (1983).

porters; thus the Qualifications Clauses were not at issue. In *Anderson*, an Ohio law required independents running for President to file for the November general election ballot access in March, while mandating that major party candidates only had to file in March for the June primary. John Anderson filed for November ballot access as an independent in May 1980, and was rejected.[101]

The Supreme Court struck down the Ohio law under a test examining the character and magnitude of the harm to the plaintiff's First and Fourteenth Amendment rights, the state's interests in burdening the prospective candidate, and the extent to which the state's interest required imposing such burdens.[102] Ohio asserted interests in equal treatment for major and minor political parties, voter education, and political stability.[103] Although the law was aimed at candidates, the Court found that voters were indirectly affected,[104] and thus weighed both groups' interests. The Court held that the state interests were inferior to candidate interests in running for office and voter interests in choosing specific candidates and promoting beliefs through association.[105] The court found that the law impermissibly gave major party candidates a greater period of time to file candidacies and gather signatures for ballot access, and that it unconstitutionally impaired independent and minor party candidates, thus diminishing voter rights of association.[106]

A second line of cases concerning a candidate's right to seek office deals with resign-to-run laws, which require state officials to resign from one office before running for Congress or any other office. The chief case, *Clements v. Fashing*,[107] concerned two provisions in the Texas Constitution. One prohibited all federal, state, and foreign officeholders from serving in the state legislature.[108] The second forced Texas county and state officeholders to resign before running for other offices.[109] The plaintiffs were state officeholders who alleged that the provisions discriminated against them as incumbents. They claimed that the provisions violated the First and Fourteenth Amendments by effectively preventing them from running for higher state office.[110] The Supreme Court upheld the provisions.[111] Then Associate Justice William Rehn-

101. *Id.* at 782-83.
102. *Id.* at 789.
103. *Id.* at 796.
104. *Id.* at 786.
105. *Id.* at 806.
106. *Id.* at 790-93.
107. 457 U.S. 957 (1982).
108. *Id.* at 960.
109. *Id.*
110. *Id.* at 959-61.
111. *Id.* at 971-73 (majority opinion); *id.* at 962-971 (plurality opinion). Justice Rehnquist

quist first reaffirmed the absence of any fundamental right to run for office.[112] Then Associate Justice William Rehnquist next found that the state had interests in maintaining the integrity of state government by preventing officeholders from disregarding their duties to campaign, and in preserving its nonpartisan judiciary.[113] According to the opinion, the provisions were only a "*de minimis* burden upon the political aspirations of a *current* officeholder,"[114] and thus any burden they caused was outweighed by the state interests.[115] The Court concluded that because state officeholders could remain politically active in ways other than running for office, such as becoming involved in party politics, supporting other candidates, and raising and spending money, their First Amendment rights were not infringed upon to the point where the state's interest was inferior.[116]

In *Burdick v. Takushi*,[117] a case factually inapposite with *U.S. Term Limits*, yet relevant, the Supreme Court considered a Hawaii law prohibiting write-in voting. The Court used this case, brought by a voter desiring to cast a protest vote for Donald Duck,[118] to announce that *Anderson v. Celebrezze*[119] controls in cases alleging a deprivation of voting rights by state law.[120] Using the *Anderson* test, the Court held Hawaii's prohibition constitutional because the state afforded candidates three liberal avenues to the ballot: a major party primary victory, a minor party primary victory, or a relatively simple two-step process to become an independent candidate.[121]

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wrote for the majority with regard to the First Amendment analysis, but only for a plurality on the 14th Amendment issue.

112. *Id.* at 963 (citing Bullock v. Carter, 405 U.S. 134 (1972)).

113. *Id.* at 968-69.

114. *Id.* at 967 (emphasis in original).

115. *Id.* at 966-71.

116. *Id.* at 972. This argument, however, does not square well with other Supreme Court decisions on political expression. *Cf.* Texas v. Johnson, 491 U.S. 397, 416 n.11 (1989) (citing Spence v. Washington, 418 U.S. 405, 411 n.4 (1974)) (rejecting notion that form of expression can be restricted because alternate methods to express the same idea exist); *see also* Signorelli v. Evans, 637 F.2d 853 (2nd Cir. 1980), which upheld a similar New York resign-to-run law as applied to a state judge wishing to run for Congress, which put the Qualifications Clauses at issue. The court likened the New York law to the U.S. Constitution's Incompatibility Clause, which prevents current federal officeholders from also serving in Congress. *Id.* at 859-61; *see* U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States. . . ."); *see also* Joyner v. Mofford, 706 F.2d 1523 (9th Cir.) (upholding a similar California law), *cert. denied*, 464 U.S. 1002 (1983).

117. 504 U.S. 428 (1992).

118. *Id.* at 430, 438.

119. 460 U.S. 780 (1983); *see supra* notes 100-06 and accompanying text.

120. *Burdick*, 504 U.S. at 438.

121. *Id.* at 435-38. Hawaii asserted, among others, an interest in preventing those candidates previously rejected by voters in primaries from becoming "sore-loser" write-in candidates. *Id.* at

IV. ANALYSIS OF *U.S. TERM LIMITS, INC. V. THORNTON*

U.S. Term Limits was decided by a vote of five to four by the U.S. Supreme Court. Justice Stevens authored the majority opinion, joined by Justices Kennedy, Souter, Ginsberg, and Breyer; Justice Kennedy penned a thoughtful concurrence on the issue of federalism; Justice Thomas wrote a scathing dissent garnering the support of Chief Justice Rehnquist and Justices O'Connor and Scalia.

Beyond the issue of limiting congressional terms, the majority and the dissent in *U.S. Term Limits* hold fundamentally dichotomous views on the concepts of democracy and federalism growing from the Tenth Amendment, and the U.S. Constitution as a whole. Little is made of case law in the majority and dissenting opinions; the battle is primarily waged on historical and philosophical warfields. These opposing factions on the Court were not "sniping [over] technical legalisms,"[122] but instead were rolling out "the heavy artillery of first principles."[123]

A. *The Majority Opinion*

As is often the case in jurisprudence, the manner in which a court frames the issues to be resolved foreshadows its ultimate decision. Justice Stevens highlights two that could not have differed more from the way in which Justice Thomas frames his dissent:[124] First, whether the congressional qualifications set forth in Article I of the Constitution are exclusive and shielded from alteration by the states; and second, whether the construction of Amendment 73 as a "ballot access" regulation was sufficient to cure it of any qualifications properties.[125]

1. *POWELL V. MCCORMACK* REVISITED

Following a short factual and procedural discussion,[126] the majority

439. The plaintiff asserted interests in casting protest votes and meaningful ballots, among others. *Id.* at 437-38. Coupled with the ease of ballot access, the Court concluded that "it can hardly be said that the laws at issue here unconstitutionally limit access to the ballot . . . or unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot." *Id.* at 434.

122. John G. Kester, *The Bipolar Supreme Court*, WALL ST. J., May 31, 1995, at A17.

123. *Id.*

124. *U.S. Term Limits*, 115 S. Ct. at 1875 (Thomas, J., dissenting). In fact, Justice Thomas does not even identify the issues for resolution in syllogistic form; he merely announces his conclusion that:

> [n]othing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.

Id.; *see infra* notes 200-279.

125. *Id.* at 1847 (majority opinion).

126. *Id.* at 1845-47. Petitioners in U.S. Term Limits originally challenged the suit by alleging

opinion begins by setting forth a "full statement"[127] of *Powell v. McCormack*,[128] the sole case to which the opinion affords great weight. "Our resolution of these issues draws upon our prior resolution of a related but distinct issue: whether Congress has the power to add to or alter the qualifications of its Members."[129]

After briefly chronicling the issue in *Powell*,[130] the majority focuses on those aspects of *Powell* most relevant to *U.S. Term Limits*: its reliance on history with regard to legislative qualifications and democratic principles generally. The *Powell* Court, Stevens notes, was highly persuaded by the probable impact that the evolution of English precedent on Parliament's ability to set its members' own qualifications had on the Framers of the Constitution.[131] Of particular interest to the Court was the late eighteenth-century ordeal of John Wilkes, who was elected to Parliament, yet denied membership on specious grounds.[132] Stevens reiterates *Powell*'s finding that by the time the Framers assembled in Philadelphia, English parliamentary qualifications were deemed "not occasional but fixed."[133]

Against this historical background, the majority reviews the Framers' discussions of legislative qualifications, including rejected proposals that would have granted Congress the power to impose property or any

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that the cases were non-justiciable for want of standing and ripeness. *Hill*, 872 S.W.2d at 353. The Arkansas Supreme Court dismissed these challenges, however, and rendered judgment on the merits. *Id.* at 353-54 (plurality opinion). No justice dissented from the plurality's justiciability holdings. *Id.* at 361 (Gerald Brown, Special Justice, concurring in part and dissenting in part); *id.* at 367 (Dudley, J., concurring in part and dissenting in part); *id.* at 368 (Hays, J., concurring in part and dissenting in part); *id.* at 368 (Cracraft, Special C.J., concurring in part and dissenting in part). The Arkansas trial court also held the case justiciable. *Id.* at 353 (quoting the trial court's Conclusions of Law). Petitioners in *U.S. Term Limits* apparently did not raise the issue before the U.S. Supreme Court. Reference to justiciability was not found in any of the briefs filed in *U.S. Term Limits* obtained by the author, nor was it argued before the Supreme Court, *see* Transcript of Oral Argument, *supra* note 77, and the issue was not mentioned by the majority, concurring, or dissenting opinions.

127. *U.S. Term Limits*, 115 S. Ct. at 1848.

128. 395 U.S. 486 (1969).

129. *U.S. Term Limits*, 115 S. Ct. at 1847.

130. *See supra* notes 66-73 and accompanying text.

131. The *Powell* Court examined several challenges to members' qualifications by the English Parliament and colonial legislatures from 1553 until the Constitutional Convention in 1787. *Powell*, 395 U.S. at 522-31.

132. *See U.S. Term Limits*, 115 S. Ct. at 1848-49 (summarizing *Powell*'s discussion of the Wilkes case). In short, Wilkes, a member of Parliament, was imprisoned and expelled for seditious libel in the 1760s for his criticism of a peace treaty with France and declared ineligible for future membership in Parliament. He was nonetheless reelected several times, yet Parliament refused to seat him until 1782, when it rescinded its prior resolutions and declared them "subversive of the rights of the whole body of electors of this kingdom." *Powell*, 395 U.S. at 527-28 (quoting 22 PARL. HIST. ENG. 1411 (1782)).

133. *U.S. Term Limits*, 115 S. Ct. at 1848 (internal quotation marks omitted) (quoting *Powell*, 395 U.S. at 528) (quoting 16 PARL. HIST. ENG. 589-90 (1769)).

form of qualifications on its membership.[134] Surveying the ratification debates,[135] congressional interpretation of the Qualifications Clauses,[136] and the implication of the clauses' exclusivity within the Constitution,[137] Stevens, in effect, reaffirms *Powell*'s holding: "[W]ith respect to Congress, the Framers intended the Constitution to establish fixed

134. "We found particularly revealing the debate concerning a proposal . . . [to give] Congress the power to add property qualifications. James Madison argued that such a power would vest 'an improper & dangerous power in the Legislature,' by which the Legislature 'can by degrees subvert the Constitution.' " *Id.* at 1849 (quoting *Powell*, 395 U.S. at 533-34) (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 249-50 (Max Farrand ed., 1911) [hereinafter Farrand] (internal quotation marks omitted)).

135. *E.g.*, Alexander Hamilton's position that "[t]he qualifications of the persons who may choose or who may be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature." *Id.* (quoting *Powell*, 395 U.S. at 539) (quoting THE FEDERALIST No. 60, at 371 (Alexander Hamilton) (C. Rossiter ed., 1961)) (emphasis and internal quotation marks omitted).

136. *Id.* at 1850: "[D]uring the first 100 years of its existence, 'Congress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution.' " (quoting *Powell*, 395 U.S. at 542). Congress, however, has excluded members over the course of history for reasons beyond failure to comport with the Qualifications Clauses. *Powell*, 395 U.S. at 541-42. Nonetheless, the *Powell* Court declared, "[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Id.* at 546-47.

One interesting episode took place in 1807, when the election of Representative William McCreery was challenged for failure to comply with what amounted to a state law mandating district residency. Although the House ultimately seated McCreery without comment, 17 ANNALS OF CONG. 1235-38 (1807), William Findley, Chairman of the House Committee of Elections, declared the committee found that "the qualifications of members [were] unalterably determined by the Federal Convention, *unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them.*" *Id.* at 872 (emphasis added). Recall that Findley argued during the ratification debates that congressional rotation of office was "entirely excluded" from the Constitution. *See supra* note 34 and accompanying text. As recognized in *Powell*, "[t]he precedential value of [such qualification contests in Congress] tends to increase in proportion to their proximity to the Convention in 1787." *Powell*, 395 U.S. at 547 (citing Myers v. United States, 272 U.S. 52, 175 (1926)).

137. *U.S. Term Limits*, 115 S. Ct. at 1850 & n.9. Here Stevens is referring to the *expressio unius est exclusio alterius* rule of construction. According to this maxim, "the expression of one thing is the exclusion of the other." BLACK'S LAW DICTIONARY 403 (6th ed. 1990).

The Qualifications Clauses list age, citizenship, and state residency requirements for membership in Congress. U.S. CONST. art. I, § 2, cl. 2 (House) and art. I., § 3, cl. 3 (Senate); *see supra* note 9 for the language of the clauses. Applying the maxim, only those qualifications listed are permitted, to the exclusion of all others.

The Constitution also contains five other arguable qualifications that apply to all federal (and some state) offices. If the provisions constitute qualifications, they would also fall within the maxim. *See* U.S. CONST. art. I, § 3, cl. 7 (disqualifying anyone impeached from federal office); art. I, § 6, cl. 2 (preventing members of Congress from holding other federal office and vice-versa); art. IV, § 4 (guaranteeing "a Republican Form of Government"); art. VI, cl. 3 (requiring all federal and state officers to take an oath to support the Constitution); amend. XIV, § 3 (disqualifying those who supported the Confederacy in violation of the Article VI oath from federal and state office); *see also U.S. Term Limits*, 115 S. Ct. at 1847 n.2 (acknowledging same, but finding them irrelevant to the case because they are in the text of the Constitution).

qualifications."[138]

With regard to the democratic principles on which *Powell* relied, "[w]e noted that allowing Congress to impose additional qualifications would violate that 'fundamental principle of our representative democracy . . . 'that the people alone should choose whom they please to govern them.' " "[139] Stevens gleans two important factors from this "fundamental principle." First, *Powell* recognized the Framers' ideal that everyone be able to attain elective office.[140] Second, because under our federal system the people are ultimately the sovereign, they reserve "the right to choose freely their representatives to the National Government."[141]

2. STATE POWER TO ESTABLISH QUALIFICATIONS

Acknowledging that *Powell* did not expressly prohibit additional qualifications imposed outside of Congress' chambers, Stevens rejects the petitioners' argument that the Tenth Amendment reserves such a right to the states because the Constitution does not forbid it to them.[142]

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138. *U.S. Term Limits*, 115 S. Ct. at 1850 (footnote omitted), 1852. Later, Stevens addresses an argument posited by the Petitioners, that Powell's holding was simply that Congress could not exclude a member under its power to judge his or her qualifications, and not that Congress could not add qualifications. *Id.* at 1851. Responding that "*Powell* . . . is not susceptible to such a narrow reading," *id.*, Stevens quotes Chief Justice William Rehnquist's opinion in *Nixon v. United States*:

> [In *Powell* w]e held that, in light of the three requirements specified in the Constitution, the word "qualifications"—of which the House was to be the Judge—was of a precise, limited nature. . . . [ ]"The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution; and are unalterable by the legislature."[ ]
>
> Our conclusion in Powell was based on the fixed meaning of "qualifications" set forth in Art. I, 2. The claim by the House that its power to "be the Judge of the Elections, Returns and Qualifications of its own Members" was a textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the only qualifications which might be imposed for House membership.

Id. at 1851 (quoting Nixon v. U.S., 113 S. Ct. 732, 740 (1993)) (citations omitted). Ironically, at oral argument, Rehnquist seemingly backed away from his own word choice in *Nixon*, suggesting that portion of *Powell* dealing with the exclusivity of the Qualifications Clauses is "dicta, is it not? . . . And we . . . are not bound by dicta." Transcript of Oral Argument, *supra* note 77, at 20.

139. *U.S. Term Limits*, 115 S. Ct. at 1850 (quoting *Powell*, 395 U.S. at 547 (quoting 2 ELLIOT'S DEBATES 257)).

140. For example, the opinion cites Madison's belief that with the exception of the Article I congressional qualifications, "the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." *Id.* (quoting *Powell*, 395 U.S. at 540 n.74 (quoting THE FEDERALIST No. 52, at 326) (James Madison) (Clinton Rossiter ed., 1961) (internal quotations marks omitted)).

141. *Id.* at 1851.

142. *Id.* at 1852. Stevens also notes the apparent unanimity of courts holding that states could not impose further qualifications for congressional office and the similar agreement of

Stevens declares that because the states did not originally possess the power to add qualifications, the Constitution could not reserve it to them.[143] He adds that even if this original state power existed, the Framers intended the Constitution to be the sole source of congressional qualifications, "thereby 'divest[ing]' " the states thereof.[144]

The majority first examines the basis of the authority to add congressional qualifications.[145] The Petitioners submitted that as the Constitution was a limited excision of state sovereignty, all not expressly excised remained *in toto* to the states, including the power to impose qualifications upon their congressional delegations.[146] Dismissing this proposition, Stevens notes that in the 175 years since *McCulloch v. Maryland*,[147] the Court has recognized that the states retained only those powers they had prior to the Constitution. Upon ratification, Stevens reasons, the states did not accede to any new powers to interfere with the federal government that they obviously could not possess prior to its existence.[148] Because the Constitution created a national government responsible to the people, as opposed to an assembly of delegates responsible to the states,[149] members of Congress "owe primary allegiance not to the people of a State, but to the people of the Nation."[150]

> Representatives and Senators are as much officers of the entire union as is the President. States thus "have just as much right, and no more, to prescribe new qualifications for a representative as for a president. . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union."[151]

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commentators prior to *Powell*. *See id.* at 1852-53 (citing 18 cases and seven commentaries); *id.* at 1853 n.14 (also noting conflicting opinions in recent law review articles and collecting same).

143. *Id.* at 1853-54.

144. *Id.*

145. *Id.* at 1854-56.

146. *Id.* at 1854.

147. 17 U.S. (4 Wheat.) 316 (1819).

148. *U.S. Term Limits*, 115 S. Ct. at 1854: "As Chief Justice Marshall pointed out, an 'original right to tax' . . . federal entities 'never existed, and the question whether it was been surrendered, cannot arise.' " (quoting *McCulloch*, 17 U.S. at 430). In addition, "[a]s Justice [Joseph] Story recognized, 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.' " *Id.* (quoting STORY, *supra* note 77, § 627).

149. *Id.* at 1855, 1863.

150. *Id.* at 1855.

151. *Id.* (quoting 1 STORY, *supra* note 77, § 627). To support the idea that members of Congress are federal and not state officers, Stevens points to the fact that Congress, and not the individual states, judges qualifications for membership (U.S. CONST. art. I, § 5, cl. 1); that members are paid by the federal treasury and not by the states that elected them (art. I, § 6, cl. 1); and that the Constitution *delegates* to the states the power to select presidential electors (art. II, § 1, cl. 2) and administer congressional elections (art. I, § 4, cl. 1). *U.S. Term Limits*, 115 S. Ct. at 1855-56.

Having concluded that the states possess no original power to impose congressional qualifications, the majority next examines whether the Constitution delegates such a power to them.[152] Here, Stevens delves into the history that powers his opinion, assessing not only the Framers' intent and democratic principles,[153] but also past practices of Congress and the states, which "leads unavoidably to the conclusion that the States lack the power to add qualifications."[154]

During both the Constitutional Convention and the battle for ratification, the majority notes, many people were concerned that the states would seek to improperly meddle with the workings of the federal government.[155] In response, the Framers limited the extent to which states could interfere with federal elections,[156] required that the federal government pay members of Congress[157] and provided that the House and Senate, not the states, judge their members' qualifications.[158] In addition, the majority finds it compelling that during the ratification debates no one even suggested that the states could add qualifications, including term limits, beyond those in the Constitution.[159]

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152. *U.S. Term Limits*, 115 S. Ct. at 1855-56.

153. Stevens reiterates the principles highlighted in *Powell*, *e.g.*, the "egalitarian ideal—that election to the National Legislature should be open to all people of merit. . .," *id.* at 1862, and "the right of the people to vote for whom they wish," *id.* at 1863. He adds that because members of Congress represent the people of the nation collectively and not the states individually, permitting a patchwork of differing qualifications by state would "sever the direct link that the Framers found so critical between the National Government and the people of the United States." *Id.* at 1864 (footnote omitted).

154. *Id.* at 1856.

155. *Id.* at 1856-60.

156. For example, by requiring that voter qualifications for federal elections be the same as those for state elections, "to prevent discrimination against federal electors. . . ." *Id.* at 1857. Furthermore, the Framers feared the states might abuse their discretion under the Elections Clause and decline to hold congressional elections to, in effect, kill the federal government. *Id.* at 1857-58. Thus, they provided that Congress could "make or alter" election regulations concurrent with state authority. *Id.*

157. *Id.* at 1858. The Framers feared that if federal representatives depended on their states for compensation, it could be used as a carrot to improperly influence congressional conduct or set so low as to discourage the most qualified candidates from seeking office. *Id.* (citing 1 Farrand, *supra* note 134, at 216, 372-73).

158. *Id.* at 1859. The majority reasoned that because federal questions should be decided uniformly, federal law, rather than state law, generally controls the decisions. State qualifications for membership in Congress would require a court to examine state law which would conflict with the perceived intentions of the Framers. *Id.* (citing Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875)); *cf.* Roudebush v. Hartke, 405 U.S. 15, 27 (1972) (U.S. Senate could ignore Indiana's ballot recount and declare the victor of a close election under Article I, § 5 of the Constitution).

159. *U.S. Term Limits*, 115 S. Ct. at 1859. Stevens notes that the absence of a rotation-of-office provision was "a major source of controversy." *Id.*; *see also supra* notes 32-40 and accompanying text. The Anti-Federalists disparaged the Constitution for its failure to include term limitations. By implication, they must have believed the states did not have the power to limit terms. *U.S. Term Limits*, 115 S. Ct. at 1859-60. Consequently, Stevens writes:

> [I]f it had been assumed that States could add additional qualifications, that

Reviewing congressional and state practices after ratification with regard to whether the states could set qualifications for service in Congress, the majority finds "further evidence of the general consensus on the lack of state power in this area."[160] As explained in *Powell*, congressional interpretation of the exclusivity of the Qualifications Clauses has differed over the years.[161] But Stevens indicates that even this irregular practice shows the absence of a general understanding that states could add to congressional qualifications.[162] Finally, although Virginia required its congressional delegation to be landholders for the first fifteen years of the new federal government,[163] no other state imposed a similar requirement (although many mandated that state legislators be freeholders).[164] Furthermore, while some states limited the terms of their state officials and delegates to the Continental Congress, no state sought to similarly limit its federal representatives.[165]

The majority concludes that these facts, taken together, exhibit conclusively that the Framers intended that "neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution."[166]

3. PERMISSIBLE BALLOT ACCESS REGULATION OR UNCONSTITUTIONAL QUALIFICATION?

The majority then faces the real issue in *U.S. Term Limits*: whether Amendment 73 was saved from invalidity because it allowed incumbents to be reelected by write-in vote. The petitioners argued that even if the Constitution denied the states the ability to impose qualifications for membership in Congress, Amendment 73, by only denying ballot access, was merely an election regulation, authorized by the Constitution and the Court's own precedent.[167]

> assumption would have provided the basis for a powerful rebuttal to the arguments being advanced. The failure of intelligent and experienced advocates to utilize this argument must reflect a general agreement that its premise was unsound, and that the power to add qualifications was one that the Constitution denied the States.

Id. at 1860 (footnote omitted).

160. *Id.* at 1861, 1866.

161. *See supra* note 136 and accompanying text.

162. *U.S. Term Limits*, 115 S. Ct. at 1861-62. Nonetheless, Stevens focuses on three cases in which Congress found that the states could not impose additional qualifications. *Id.* (House seating William McCreery notwithstanding his failure to meet a state district residency requirement; Senate seating Charles Faulkner and Pierre Salinger).

163. *Id.* at 1865 (citing 1788 Va. Acts, ch. 2, § 2 and 1813 Va. Acts, ch. 23, § 2).

164. *Id.* at 1865 & n.35.

165. *Id.* at 1865-66.

166. *Id.* at 1866.

167. *Id.* at 1866-67.

The petitioners pointed to *Storer v. Brown*[168] for the proposition that if an election regulation only limits ballot access, it cannot amount to an unconstitutional qualification for office.[169] The majority quickly dispenses with this argument, concluding that Amendment 73 is an indirect attempt to skirt the Qualifications Clauses.[170] "As we have often noted, '[c]onstitutional rights would be of little value if they could be . . . indirectly denied.' "[171] "The Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on Constitutional protections."[172] Even though some congressional incumbents could perhaps mount a successful write-in campaign,[173] the majority states that it cannot countenance such a small " 'glimmer[ ] of opportunity' "[174] and allow the Framers' efforts to be defeated by an end run around the Qualifications Clauses.[175]

The majority also rejects the petitioners' position that Amendment

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168. 415 U.S. 724 (1974); *see supra* notes 87-99 and accompanying text.

169. *U.S. Term Limits*, 115 S. Ct. at 1867.

170. *Id.* In support of this view, Stevens refers to the finding of the *Hill* plurality that the provision is "an 'effort to dress eligibility to stand for Congress in ballot access clothing,' because the 'intent and effect of Amendment 73 are to disqualify congressional incumbents from further service,' " *Id.* at 1867, 1868 n.44 (quoting *Hill*, 872 S.W.2d at 357). Stevens accepts the state court conclusion as binding. *Id.* at 1867. Additionally, Stevens notes that the preamble to Amendment 73 reads that Arkansans "herein limit the terms of elected officials." *Id.* at 1868. *See supra* note 1.

171. *Id.* at 1867 (quoting Harman v. Forssenius, 380 U.S. 528, 540 (1965) (quoting Smith v. Allright, 321 U.S. 649, 664 (1944)).

172. *Id.* (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939) and citing Harman, 380 U.S. at 540-41). *See also* Western Union Tel. Co. v. Foster & MacLeod, 247 U.S. 105, 114 (1918) ("a constitutional power cannot be used by way of condition to attain an unconstitutional result") (citations omitted).

173. Stevens notes the Court has in the past viewed this possibility as bleak, *U.S. Term Limits*, 115 S. Ct. at 1868 n.45, and that experience has borne this out. *Id.* at n.43 (since 1913, only one in more than 1,300 Senators elected by write-in vote; since 1900, only five in more than 20,000 elected by write-in vote in the House); *see, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 799 n.26 (1983).

174. *U.S. Term Limits*, 115 S. Ct. at 1868 n.43 (quoting *Hill*, 872 S.W.2d at 357).

175. *Id.* at 1868. Amendment 73

> trivializes the basic principles of our democracy. . . . [and] treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism. " 'It is inconceivable that guaranties [sic] embedded in the Constitution of the United States may thus be manipulated out of existence.' "

Id. (quoting Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960) (quoting Frost & Frost Trucking Co. v. Railroad Comm'n of Cal., 271 U.S. 583, 594 (1926)). For an application of this principle in a similar term limit case, see Thorsted v. Gregoire, 841 F. Supp. 1068, 1081, *aff'd sub nom.* Thorsted v. Munro, No. 94-35222 *et seq.*, 1996 WL 39389 (9th Cir. Jan. 30, 1996):

> [The congressional] ballot access provision would thus have the practical effect of imposing a new qualification: non-incumbency beyond the specified periods. The intended and probable result would be the same as if the State were to adopt non-incumbency as an absolute requirement. A state may not do indirectly what the Constitution forbids it to do directly.

73 is a manner regulation permitted by that the Elections Clause.[176] First, the Court concludes that if it accepted the petitioners' argument, Congress could, in effect, modify the qualifications of its members through the Elections Clause grant of power to "make or alter" a state's regulations. This would directly contradict the majority's earlier finding that the Framers intended that Congress be denied the ability to meddle with its qualifications for membership.[177]

Second, the majority distinguishes Amendment 73's ballot access orientation from prior cases upholding election regulations, which "served the state interest in protecting the integrity and regularity of the election process"[178] without "even arguably impos[ing] any substantive qualification rendering a class of potential candidates ineligible for a ballot position,"[179] let alone denying ballot access to candidates with popular support.[180] The majority similarly distinguishes resign-to-run laws,[181] also cited by the petitioners for support, as a "permissible attempt to regulate state officeholders,"[182] and not " 'a desire . . . to impose additional qualifications to serving in Congress.' "[183]

The majority also focuses on the Framers' understanding of the Elections Clause.[184] In the Federalist Papers and during the ratification debates, the Framers viewed this clause as "grant[ing] States authority to create procedural regulations, not provid[ing] States with license to

176. *U.S. Term Limits*, 115 S. Ct. at 1868-69; *see supra* note 82 for the text of the Elections Clause.

177. *Id.* at 1869 ("We refuse to adopt an interpretation of the Elections Clause that would so cavalierly disregard what the Framers intended to be a fundamental constitutional safeguard.").

178. *Id.* at 1870.

179. *Id.*; *see, e.g.*, Storer v. Brown, 415 U.S. 724, 730 (1974) (discussed *supra* at notes 87-99 and accompanying text and upholding California ballot access provisions to maintain orderly elections); Roudebush v. Hartke, 405 U.S. 15, 25 (1972) (state regulations to ensure "fair and honest" elections are allowed); Burdick v. Takushi, 504 U.S. 428, 433 (1992) (states may pass laws to make sure that elections operate "equitably and efficiently."); *see also U.S. Term Limits*, 115 S. Ct. at 1870 (quoting same).

Indeed, by encouraging congressional incumbents to mount write-in campaigns, Amendment 73 would likely create havoc in elections by encouraging a popular incumbent barred from the ballot to run against not only a rival from an opposing party, but also a member of her own party, for the office Amendment 73 seemingly forced her to vacate. Thus, Amendment 73 would undercut the principle underlying the Court's Elections Clause decisions by likely causing post-primary intraparty battles, and leading to probable voter confusion. For a discussion of these issues, see the *Amicus Curiae* Brief of the California Democratic Party, *et al.*, at 12-19, *U.S. Term Limits* (Nos. 93-1456 and 93-1828).

180. *U.S. Term Limits*, 115 S. Ct. at 1870.

181. *See supra* notes 107-116 and accompanying text.

182. *U.S. Term Limits*, 115 S. Ct. at 1870 n.48 (citing Clements v. Fashing, 457 U.S. 957 (1982)).

183. *Id.* (quoting Joyner v. Mofford, 706 F.2d 1523, 1528 (9th Cir. 1983)).

184. *Id.* at 1869; *see supra* note 82 for the text of the Clause.

exclude classes of candidates from federal office."[185]

In conclusion, the majority recognizes that the merits of term limitations are as much a matter of debate today as they were at the creation of the Constitution. But because "[w]e are . . . firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework,"[186] a constitutional amendment is required to set them in place.[187]

B. *Justice Kennedy's Concurrence*

Justice Kennedy agreed with the majority, but chose also to submit a brief opinion responding more in depth to the dissent to "explain why that course of argumentation runs counter to fundamental principles of federalism."[188] Crafted as a philosophical declaration of the protections that federalism affords to American citizens, collecting dicta in support, the concurrence stands less as a leviathan of authority, but more as a reasoned beacon for future jurisprudence in this area, akin to Justice Black's highly regarded explanation of presidential war power authority in *Youngstown Sheet & Tube Co. v. Sawyer*.[189]

In describing the rights appurtenant to and character of a federalist system, Justice Kennedy begins by highlighting the source of the national government's power, and to whom it is responsible: the citizens of the United States.[190] The people, Kennedy proclaims, have separate and independent, though consistent, political identities—one

185. *U.S. Term Limits*, 115 S. Ct. at 1869. For example, Madison suggested the clause involved such procedural matters as "[w]hether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for the representatives; or all in a district vote for a number allotted to the district." *Id.* (quoting 2 Farrand, *supra* note 134, at 240). Similarly, proponents of the Clause noted during the ratification debates that " '[t]he power over the manner only enables them to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way.' " *Id.* (quoting 4 ELLIOT'S DEBATES 71) (emphasis in original).

186. *Id.* at 1871.

187. *Id.*

188. *Id.* at 1872 (Kennedy, J., concurring).

189. 343 U.S. 579, 634 (1952) (Jackson, J., concurring). Although his was not the majority opinion, Justice Jackson's concurrence has garnered much of the attention in subsequent cases involving foreign policy, separation-of-power issues. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 661 (1981) (Justice Jackson's concurrence in *Youngstown* "brings together as much combination of analysis and common sense as there is in this area").

190. "A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people that created it." *U.S. Term Limits*, 115 S. Ct. at 1872 (Kennedy, J., concurring). The "republican principles" upon which it was founded,

> makes it 'a national government,' not merely a federal one. . . . . The Court confirmed this . . . when it said, 'The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.'

national and one state.[191] He writes that *McCulloch v. Maryland*[192] substantiates this by confirming the notion that the federal government was "controlled by the people without collateral interference by the states."[193]

Kennedy does not deny the states' importance in our system of government, but he rejects the idea that states may project themselves onto the "sovereign federal province."[194] The mere fact that people vote in the states in which they reside, electing fellow state residents to Congress and to be presidential electors, both pursuant to *state* law, does not impart a delegation of the people's federal power to their states, but merely reflects that the Constitution is "solicitous of the prerogatives of the States . . . ."[195] When people vote in congressional elections, they "act in a federal capacity and exercise a federal right."[196] Thus, Kennedy concludes, the states have no authority to intrude beyond any power that the Constitution itself confers.[197]

Concomitant with the citizenry's protected right to participate in

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Id. (quoting THE FEDERALIST No. 39, at 245, and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819), respectively).

191. *Id.* at 1872-73 (citing Shapiro v. Thompson, 394 U.S. 618, 630 (1969) and Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43 (1868)).

192. 17 U.S. (4 Wheat.) 316 (1819).

193. *U.S. Term Limits*, 115 S. Ct. at 1873 (Kennedy, J., concurring). State interference with "federal powers . . . 'was not intended by the American people. They did not design to make their government dependent upon the states.'" *Id.* (quoting *McCulloch*, 17 U.S. at 432). This recognition cuts both ways, Kennedy notes. "That the States may not invade the sphere of federal sovereignty is as incontestable in my view as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States." *Id.* (citing United States v. Lopez, 115 S. Ct. 1624 (1995)).

194. *Id.*

195. *Id.* Spurning the argument that the people delegate their power to the states under the Constitution because they ratified it not by a federal convention, but instead through individual state conventions, Kennedy writes,

> in McCulloch v. Maryland, the Court set forth its authoritative rejection of this idea:
>
> > 'The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument . . . was submitted to the people. . . . It is true, they assembled in the several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.'

Id. (quoting *McCulloch*, 17 U.S. at 403).

196. *Id.* at 1873-74 (Kennedy, J., concurring) (citing Ex Parte Yarbrough, 110 U.S. 651, 663-64 (1884) (voters in congressional elections do not "owe their right to vote to the State") and United States v. Classic, 313 U.S. 299, 315 (1941) (the right to vote in congressional elections "is a right secured by the Constitution" against "the action of individuals as well of states")).

197. *Id.* at 1873.

federal elections, Kennedy argues, are "privileges and immunities protected from state abridgement by the force of the Constitution itself."[198] By assuming the power to limit voters' choices in future federal elections by attaching significance to whom they vote for presently, Arkansas unconstitutionally encroached upon federal rights which it has no power to burden.[199]

C. *Justice Thomas' Dissent*

In opening his dissent, Justice Thomas fires a cannonball of irony across the bows of the majority and concurrence. Disputing Stevens' view that Amendment 73 violates "the right of the people to 'choose whom they please to govern them,' "[200] Thomas calls attention to the reality that only the people of Arkansas can make the choice of who Arkansas sends to Congress. "The majority therefore defends the right of the people of Arkansas to 'choose whom they please to govern them'

198. *Id.* at 1874. In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Court suggested that certain rights of federal citizenship were not confined to specific constitutional sources.

> Referring to these rights of national dimension and origin the Court observed: "But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws."

U.S. Term Limits, 115 S. Ct. at 1874 (Kennedy, J., concurring) (quoting *Slaughter-House Cases*, 83 U.S. at 79).

199. *Id.* at 1874-75 (citing Terral v. Burke Constr. Co., 257 U.S. 529 (1922) and Shapiro v. Thompson, 394 U.S. 618 (1969)). Kennedy also mentions, without discussing, the potential First Amendment concerns that Amendment 73 raises. *Id.* at 1874.

It should be noted, however, that the Court has never found that term limits violate the First or Fourteenth Amendments, and has twice passed on the opportunity to rule on those questions. State *ex rel.* Maloney v. McCartney, 223 S.E.2d 607 (W.Va. 1976) (Fourteenth Amendment challenge to gubernatorial term limit), *appeal dismissed for want of a substantial federal question sub nom.* Moore v. McCartney, 425 U.S. 946 (1976); Legislature v. Eu, 816 P.2d 1309 (Cal. 1991) (First and Fourteenth Amendment challenges to state legislative term limits), *cert. denied*, 503 U.S. 919 (1992). Lower courts, however, have ruled on such challenges. *Hill*, 872 S.W.2d at 349 (upholding state legislative term limits under the First and Fourteenth Amendments); Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994) (striking down congressional term limits under the Qualifications Clauses and the First and Fourteenth Amendments), *aff'd sub nom.* Thorsted v. Munro, No. 94-35222 *et seq.*, 1996 WL 39389 (9th Cir. Jan. 30, 1996). One federal district court recently expressed reservations about the constitutionality of the state term limits upheld in *Eu*, but has yet to rule on the new federal challenge. Bates v. Jones, 904 F. Supp. 1080 (N.D. Cal. 1995); *see* Dan Morain, *Judge Questions Constitutionality of State Term Limits*, L.A. TIMES, Sept. 13, 1995, *available in* LEXIS, Nexis Library, Major Papers file. Similar lawsuits challenging state legislative term limits as a result of the *U.S Term Limits* decision have been filed in Massachusetts and Nebraska. *Term Limit Foes Launch Lawsuits in Two States*, Mar. 9, 1996, *available on* Congressional and State Term Limits Homepage of the Internet, at http://www.termlimits.org/twolawsuits.shtml [hereinafter *Term Limit Foes*].

200. *U.S. Term Limits*, 115 S.Ct at 1875 (Thomas, J., dissenting) (citing *id.* at 1845, 1850-51, 1862 (majority opinion)).

by invalidating a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State."[201]

Thomas dissects the majority's case in three areas: first, that the states and their citizens reserved all powers of action not expressly proscribed by the Constitution; second, that the Qualifications Clauses do not withhold from the states the right to add thereto; and third, that by allowing congressional incumbents to win election by write-in vote and by only denying them ballot access after a certain length of prior service, Amendment 73 in no way amounts to an additional qualification for Congress.[202] Like Stevens, Thomas relies extensively on history in supporting his views, though using it to reach different conclusions. Labelled both "careless"[203] and "irresponsible"[204] by critics, this lengthy and well-researched dissent, collecting the signatures of Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia, highlights the present division on the Court regarding federal and state authority.

Throughout his opinion Thomas attacks the logic of both the majority and the concurrence, sometimes appearing downright nasty. But his dissent often suffers from the same flaws as the opinions it attacks. Thomas also raises an interesting question of who carries the burden of persuasion, particularly with regard to the historical evidence. The majority concludes that inconclusive data does not stand for Thomas' position; Thomas argues it stands against the majority reaching out to overturn a measure overwhelmingly approved by the people of Arkansas. This idea of popular sovereignty permeates his entire argument, beginning with his theory of "reserved powers."

1. RESERVATION OF POWERS BY THE STATES

The first important step Thomas takes in his attempt to tear down the majority is to state his view of how the people's sovereign powers are reserved.

> Our system of government rests on one overriding principle: all power stems from the consent of the people. To phrase the principle in this way, however, is to be imprecise about something important to the notion of "reserved" powers. The ultimate source of the Constitution's authority is the consent of the people of each individual State,

201. *Id.* at 1875 (Thomas, J., dissenting).

202. *Id.* at 1875, 1884, 1909.

203. Jeffrey Rosen, *Terminated. U.S. Supreme Court Overturns States' Congressional Term Limits*, THE NEW REPUBLIC, June 12, 1995, at 12.

204. Phelps, *supra* note 65 (quoting University of California Law Professor Harry N. Scheiber). Professor Scheiber, a leading federalism expert, also called Thomas' historical analysis "weird and almost incoherent." *Id.*

> not the consent of the undifferentiated people of the Nation as a whole.[205]

Thomas supports this notion in two ways. First, he notes that the Constitution's ratification procedure[206] provided that the document was to take effect only upon approval by nine of the thirteen states—but only upon the people in those states so ratifying.[207] This, he states, necessarily implies that the people surrendered power to the new government not as a unified public, but instead through their individual states.[208]

Second, Thomas reads the Tenth Amendment as confirming this understanding.[209] By reserving powers to the States or to the people, "the Amendment avoids taking any position on the division of power between the state governments and the people of the States: it is up to the people of each state to determine which of the 'reserved' powers their state government may exercise."[210]

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205. *U.S. Term Limits*, 115 S. Ct. at 1875 (Thomas, J., dissenting).

206. "The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the same." U.S. CONST. art. VII.

207. *U.S. Term Limits*, 115 S. Ct. at 1875 (Thomas, J. dissenting). Here Thomas implicitly agrees with Justice Kennedy's observation that in federal elections, the people are not acting on behalf of their states. Thomas is correct that only those states that ratified the Constitution were bound by it. But because Article VII called for at least nine states to ratify the Constitution before it took effect, by its own terms the Constitution elevated those individual ratifications into a collective national act, rather than state acts. For example, when Delaware residents ratified the Constitution, citizens in eight other states still had to do so to give life to the national charter. And when a second state ratified the plan, it did not take effect between those two states—they needed the voters in seven more states to do so. The ratification by the citizens of the ninth state bound not only themselves to the Constitution; it also bound voters in the eight states who had previously approved it.

Of course, once the ninth state did ratify the Constitution, the people in the 41 others that followed through the years bound only themselves. But by then, the national government was erected, with powers already delegated and reserved. In truth, those 41 states were simply seeking admission to a preexisting Union, under previously defined terms.

208. *Id.* "In Madison's words, the popular consent upon which the Constitution's authority rests was 'given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.' " *Id.* at 1875-76 (quoting THE FEDERALIST No. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961)). As argued *supra*, at note 207, Thomas' spin on this method of ratification does not necessarily comport with what actually happened. At the time of the ratification conventions, before the Constitution went into effect, the people did not truly compose "one entire nation," but instead were basically members of thirteen sovereign states. *See* ARTS. OF CONFEDERATION art. II: "Each state retains its sovereignty, freedom and independence . . . not . . . expressly delegated . . . ."; *see* ROSSITER, *supra* note 22, at 23, 37-38 (describing the uncertain status of "nationhood" at the time). People could not be voting on behalf of an "entire nation" that did not clearly exist. Their votes were for the creation, but not necessarily on behalf of a nation. Only when the people of nine states ratified the Constitution did their votes elevate to a national level.

209. *U.S. Term Limits*, 115 S. Ct. at 1876 (Thomas, J., dissenting).

210. *Id.* Thomas questions whether the phrase "the people" in the Tenth Amendment means the people of the nation or of each State. He rejects the former proposition as making "no sense" because the Constitution makes no provision for the exercise of any powers by the people as a

Thomas concludes that the structure of the Constitution "does not erase state boundaries, but rather tracks them."[211] Thus, he argues, either a state or its people, including the people of Arkansas in enacting Amendment 73, can exercise the powers reserved by the Tenth Amendment absent an express constitutional prohibition.[212] Thomas argues the majority cannot identify this required prohibition, and attacks their attempts to do so.[213]

Confronting Stevens' position that the states could only reserve those powers that they held before the Constitution (which would exclude powers over the *new* federal government),[214] Thomas posits that because the people originally delegated their power, they also did the reserving.[215] And because the power to govern at all levels springs from the people, "it would simply be incoherent to assert that the people of the States could not reserve any powers that they had not previously controlled."[216]

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whole, permitting only ratification of amendments by state conventions or legislatures. *Id.* at 1876-77. This conclusion has a fatal flaw: At the time of ratification, it was not up to "the people . . . to determine which 'reserved' powers their State governments may exercise," as the people did not possess the power to amend their state constitutions without legislative assistance or approval, and most still do not. *See infra* notes 252, 257.

211. *U.S. Term Limits*, 115 S. Ct. at 1877 (Thomas, J., dissenting). In support of the position that by ratifying the Constitution within their states, "the people of each State retained their separate political identities," *id.*, Thomas offers an unpersuasive rejection of Justice Kennedy's contrary interpretation of Chief Justice Marshall's proclamation in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See supra* note 195 and accompanying text. Thomas argues that Marshall, by declaring that the Constitution was submitted to the people as one group, was simply rejecting a lawyer's argument that the Constitution was "merely a 'compact between the States.' " *U.S. Term Limits*, 115 S. Ct. at 1877 n.2 (Thomas, J., dissenting) (quoting *McCulloch*, 17 U.S. at 363). This is contrary to what the words assert: "[W]hen [the people] act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures *of the people themselves*, or become the measures of the State governments." *McCulloch*, 17 U.S. at 403 (emphasis added).

212. *U.S. Term Limits*, 115 S. Ct. at 1877 (Thomas, J., dissenting).

213. *Id.* at 1877-84.

214. *See supra* notes 148-49 and accompanying text.

215. *U.S. Term Limits*, 115 S. Ct. at 1878 (Thomas, J., dissenting).

216. *Id.* Thomas acknowledges Justice Story's agreement with the majority—*see supra* note 148—but dismisses Story's view because "he was not a member of the Founding generation." *Id.* at 1880. Thomas further notes that Story wrote 50 years after the Constitutional Convention, and that the Court has rejected other views of Justice Story on federal/state constitutional relations. *Id.*

Thomas instead embraces the view of Thomas Jefferson, who believed that because the Constitution did not declare the Qualifications Clauses to be exclusive, or prohibit the states from adding to them, "Of course, then, by the tenth amendment, the power is reserved to the State[s]." *Id.* at 1888-89 (quoting Letter to Joseph C. Cabell (Jan. 31, 1814), *in* 14 WRITINGS OF THOMAS JEFFERSON 82-83 (A. Lipscomb ed., 1904). Jefferson, however, conceded that it is "one of the doubtful questions on which honest men may differ with the purest of motives." *Id.* Thomas claims that the "of course" that Jefferson used in that context "suggests that he himself did not entertain serious doubts of its correctness." *Id.* at 1889 n.14. *Of course*, while Story was not a member of the Founding generation, was only expressing his own opinion written in 1833, and was sometimes wrong in his opinions; Jefferson was neither in attendance at the Constitution

The incoherency appears to be Thomas' own, however. The sole distinction between the majority and Thomas here is whether the "reserved powers" include the power to affect the federal government. Thomas' astonishing interpretation of the Tenth Amendment would mean that the people may enact any measures to tinker with the national government that the Constitution does not expressly or by necessary implication divest from them.[217] Although Article I empowers Congress to make its own rules,[218] becuase it does not expressly deny power to the people to do so, this theory raises the question of whether Thomas would allow the states to enact their own rules for their congressional delegations, or here does the Constitution necessarily divest them of it.[219]

Thomas further argues that the majority incorrectly understood the holding of *McCulloch v. Maryland*.[220] He suggests that the case turned not on whether powers the states did not possess prior to the Constitution were reserved to them,[221] but on whether Congress had the power to create a national bank, and thus whether the Constitution's Supremacy

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Convention (WILLARD S. RANDALL, THOMAS JEFFERSON: A LIFE 474 (1993)); nor, as Secretary of State, was he in Congress as the Tenth Amendment was drafted (*see* ROSSITER, *supra* note 22, at 302-05), he was only expressing his own opinion in 1814; and he, too, was sometimes fallible. *See* RANDALL, *supra*, at 505-06 (Jefferson arguing a national bank would be unconstitutional); *McCulloch*, 17 U.S. (4 Wheat.) 400 (1819) (upholding constitutionality of national bank).

217. *U.S. Term Limits*, 115 S. Ct. at 1879. Thomas apparently believes there are indeed some powers prohibited to the states, although he does not square it with his Tenth Amendment view or explain how he would define "necessary." *See id.* at 1851-52 n.12 (majority opinion) (criticizing Justice Thomas' "default rule" that everything not expressly or by necessary implication delegated is reserved to the states); *id.* at 1879 n.4 (Thomas, J., dissenting) (responding and claiming he agrees with himself).

218. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings. . . .").

219. For example, could the people of Iowa enact a measure mandating that one of its Representatives hold higher rank than his or her counterparts from Iowa, regardless of seniority? Or could Texas direct that its Senators sit only on energy and aerospace committees? *See* Mark P. Petracca, *Term Limits Should Pass Constitutional Test*, MIAMI HERALD, Nov. 25, 1992, at 11A (advancing a similar argument that term limits are not qualifications but instead are "feature[s] of the institutional design of a legislature" which the people could constitutionally modify by external means).

220. *U.S. Term Limits*, 115 S. Ct. at 1879-80 (Thomas, J., dissenting) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

221. *Id.* Thomas claims the majority's view of McCulloch renders Marshall's Supremacy Clause discussion irrelevant, "because the power [to tax the bank] could not fall into the category of 'reserved' powers anyway." *Id.* at 1880. However, Thomas fails to show why Marshall bothered to discuss Maryland's original taxing powers if the case indeed rested solely upon the Supremacy Clause. Thomas attempts to do so by noting this alleged *dictum* was made "[i]n part" in response to argument of counsel, *id.* at 1880 n.6, but does not explain the remaining reasons or how they support his conclusion.

Thomas concedes that *McCulloch* also rested on the principle that one state may not tax the federal government, thereby subjecting all Americans to one state's taxing power. *Id.* But he argues that this proves his point that states cannot tinker with national institutions, be they

Clause[222] "affirmatively barred" Maryland from imposing a tax upon the bank.[223] To Thomas, *McCulloch* would only apply to Amendment 73 if there were an affirmative constitutional bar to its execution.

Thomas next turns to the majority's claim that members of Congress represent the nation as a whole, and hence are immune from individual state qualifications.[224] He dismisses the issue of whom members represent when they enter Congress as irrelevant,[225] focusing instead on the fact that their selection lies with the states individually. "[O]nce the representatives chosen by the people of each State assemble in Congress, they form a national body and are beyond the control of the individual States until the next election. But the selection of representatives in Congress is indisputably the act of the people of each State. . . ."[226] This truism, which must "baffle the majority," Thomas asserts, would be aptly demonstrated should a citizen of Georgia attempt to vote in a Massachusetts congressional election.[227]

Digging deeper, Thomas agrees with the majority that states cannot establish presidential qualifications.[228] But he adds that, "We have long understood that they do have the power . . . to set qualifications for their

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presidential qualifications or a national bank, but that they can meddle with the qualifications of their own members of Congress. *Id.*

Here Thomas seems to make what should be the majority's point. For example, were a state to decide that its members of Congress should all be in favor of dismantling the interstate highway system and impose qualifications to that effect, their presence in Congress would no longer serve to represent the nation as a whole. *Cf. id.* at 1855 (majority opinion) (members of Congress "owe primary allegiance not to the people of a State, but to the people of the Nation.").

222. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . under the Authority of the United States, shall be the Supreme Law of the Land. . . .").

223. *U.S. Term Limits*, 115 S. Ct. at 1879 (Thomas, J., dissenting).

224. *See supra* notes 149-51 and accompanying text.

225. *U.S. Term Limits*, 115 S. Ct. at 1881 (Thomas, J., dissenting) ("Political scientists can debate about who commands the 'primary allegiance' of Members of Congress once they reach Washington.").

226. *Id.* Thomas also castigates Justice Kennedy's suggestion that because voting in a congressional election is a federally protected right, doing so amounts to a federal action. "[T]he concurring opinion is . . . saying that the people of Arkansas cannot be permitted to inject themselves into the process by which they themselves select Arkansas' representatives in Congress." *Id.* (quoting *In re* Green, 134 U.S. 377, 379 (1890) (electors in federal elections not federal officers or agents)).

227. *Id.* at 1882. Thomas again appears to undercut his own argument. Assume Massachusetts imposed a qualification in 1996 that its U.S. Senators not be incumbents at the time of election. Should, hypothetically, Newt Gingrich move from Georgia to Massachusetts in 1997 and wish to reelect Ted Kennedy to the U.S. Senate, he could not vote for the Senator of his choice due to the prior actions of Massachusetts citizens in electing Kennedy to his current term while Newt was a Georgia citizen. *Cf. id.* at 1874 (Kennedy, J., concurring) ("If the majority of [Arkansas] voters had been successful in selecting a candidate, they would be penalized from exercising that same right in the future.").

228. *Id.* at 1883 (Thomas, J., dissenting).

Presidential electors," as long as those measures do not violate other constitutional provisions.[229] Because the Constitution does not "affirmatively grant[ ] this power, the power must be one that is 'reserved' to the states. It necessarily follows that the majority's understanding of the Tenth Amendment is incorrect, for the position of Presidential elector surely 'spring[s] out of the existence of the national government.' "[230]

Finally on this issue, Thomas also disputes the majority's claim that had the states possessed reserved powers over congressional elections, the Framers would not have "delegated" them the power to set the time, place, and manner of elections.[231] According to Thomas, the Constitution *requires* that states hold these elections, and while reserved powers may be contrary to delegations, they are perfectly consistent with duties.[232]

Thomas "take[s] it to be established, then, that the people of Arkansas enjoy 'reserved' powers over the selection of their representatives in Congress."[233] He then turns to his view that with these reserved powers in hand, the people cannot be denied term limitations unless the Consti-

229. *Id.* (citing Williams v. Rhodes, 393 U.S. 23, 29 (1968) and McPherson v. Blacker, 146 U.S. 1, 27-36 (1892)).

230. *Id.* (quoting *id.* at 1854 (majority opinion)). Thomas concedes that Article II, § 1, authorizing each state to appoint its presidential electors, may give the power to establish the electors' qualifications. *Id.* at 1883 n.9. But he argues that the majority may not take this position, because if the word "manner" in this clause permits the states to set qualifications for presidential electors, then its use in the Elections Clause would permit the states to set qualifications for members of Congress. *Id.*

At first glance, Thomas appears to have a strong point. The majority's analysis does focus on whether the states had an original power, and if so, whether the Constitution precludes their exercising it. *See id.* at 1854 (majority opinion). However, although both this clause and the Elections Clause use the word "manner," the context in which it is used differs. *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a number of [presidential] Electors . . . ."); *id.* art. I, § 4, cl. 1 ("The Times, Places, and Manner of holding Elections [for Congress] shall be prescribed [by the state legislatures] . . . .") In the former, the states are permitted to wholly decide how the electors are chosen; in the latter, they are only allowed to decide how to conduct the elections. Whereas the states' powers under the Elections Clauses are limited, in the least, to electing those meeting the Qualifications Clauses, the Presidential Elector Clause has no similar limitation, which would presumably allow the states the unfettered right to select electors as they please. Thomas' own choice of authority in the Tenth Amendment debate suggests he is wrong here. *See U.S. Term Limits*, 115 S. Ct. at 1888 (Thomas, J., dissenting) (quoting 14 WRITINGS OF THOMAS JEFFERSON 82) (" 'Had the Constitution been silent, nobody can doubt . . . the right to prescribe . . . [congressional] qualifications . . . would have belonged to the State[s].").

231. *U.S. Term Limits*, 115 S. Ct. at 1883-84 (discussing U.S. CONST. art I., § 4, cl. 1) ("The Times, Places, and Manner of holding Elections for Senators and Representatives *shall* be prescribed in each State by the Legislature thereof . . . .") (emphasis added).

232. *Id.* Thomas appears to misread the Clause, however. Although the Elections Clause does read "shall," it requires only that the states *hold elections*, delegating to the states how they specifically comply with the mandate. *See supra* note 82.

233. *U.S. Term Limits*, 115 S. Ct. at 1884 (Thomas, J., dissenting).

tution otherwise forbids them.[234]

2. THE QUALIFICATIONS CLAUSES

Thomas rejects the majority's position that the Framers intended the Qualifications Clauses to be exclusive, preventing the people and the states from setting their own membership requirements.[235] First, Thomas argues that these clauses merely set minimum requirements for service in Congress.[236] Second, to the extent the Framers wanted membership in Congress open to all satisfying the Clauses, he maintains that their desires were directed only at preventing Congress from adding qualifications, not the people or the states.[237] Finally, he disputes Stevens' evidence that the founding generation generally understood the Clauses to be unalterable by any political body, concluding the majority failed to meet its burden.[238]

First focusing on what the Qualifications Clauses alone reveal, Thomas decides they merely set the floor for membership, not the ceiling, particularly because the Framers neglected to include an exclusivity provision.[239] Thomas states that the Framers settled on these requirements only to ensure against one state electing "immature, disloyal, or unknowledgeable representatives to Congress"[240] to the detriment of citizens in other states who are governed by all representatives sent to Washington.[241] Responding to the majority's claim that the Framers desired uniformity in qualifications, Thomas notes that even under the Clauses, qualifications originally lacked uniformity because state law originally determined citizenship, resulting in members of Congress with differing standards of citizenship.[242] Thomas also cites to Thomas

234. *Id.* at 1885.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 1885-89. Tackling the majority's suggestion that the principle of *expressio unis est expressio alterius* precludes any additional qualifications, Thomas posits that this maxim, if true here, only precludes any additional nationwide qualifications. *Id.* at 1886.

240. *Id.*

241. *Id.* Of course, maturity, loyalty, and wisdom could all be undercut should a state impose qualifications that representatives be mentally unfit, in favor of overthrowing the government, or uneducated. Thomas apparently foresees this challenge by noting that any such qualifications would be subject to the constraints of the First and Fourteenth Amendments. *Id.* at 1887. But here Thomas is discussing the Framers' intent. The Framers could not have intended the First and Fourteenth Amendments to act as safeguards, because they obviously were not written when the Constitution was drafted. So why would the Framers have intended the Clauses to prevent the election of immature, disloyal, or unknowledgeable members of Congress, but allowed the states to add qualifications that could undercut their intent? This is the flaw in Thomas' argument.

242. *Id.* at 1888. This appears to be a technicality on Thomas' part, akin to suggesting that because Senator A received 65 percent of the vote, but Senator B only received 52 percent, their

Jefferson, who, under the guise of the Tenth Amendment, thought the Clauses were subject to state additions.[243]

Next Thomas turns to the majority's idea that "democratic principles" disallow the states or the people from imposing further qualifications for congressional office.[244] The majority's evidence, Thomas argues, suggests only that the Framers wanted neither Congress to be able to impose other requirements, nor the people and the states "to be constrained by too many qualifications at the national level."[245]

Thomas disputes the majority's reading of *Powell v. McCormack*[246] as holding that the Qualifications Clauses are exclusive, opining that the issue was whether the House's power to judge qualifications allowed it to impose others, not whether the Clauses prevented it from doing so.[247] Thomas claims that the Framers only feared congressional self-aggrandizement in fixing Congress' qualifications, "[b]ut neither the people of the States nor the state legislatures would labor under the same conflict of interest . . . ."[248]

Furthermore, Thomas suggests that "the right to choose may include the right to winnow,"[249] akin to a pre-Seventeenth Amendment[250] state legislature mandating that an incumbent senator not be

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qualifications are different. The Constitution required only that members of Congress be citizens, as then recognized by their states.

243. *Id.* at 1888-89; *see supra* note 216 for a more detailed discussion of this reference.

244. *U.S. Term Limits*, 115 S. Ct. at 1889 (Thomas, J., dissenting). Thomas finds fault in the belief that Amendment 73 is undemocratic, when the people of Arkansas can repeal it as easily as they enacted it. *Id.* at 1891. This ignores Justice Kennedy's argument that voters cannot constitutionally decide now that they cannot vote for a candidate again in the future. *See supra* note 199 and accompanying text.

245. *U.S. Term Limits*, 115 S. Ct. at 1889 (Thomas, J., dissenting). Thomas suggests that when Madison argued that " 'the door of [the House] is open to merit of every description' " under the Qualifications Clauses, Madison was simply asserting that the Constitution did not make the Clauses overly restrictive, but allowed state additions. *Id.* at 1891-92 (quoting THE FEDERALIST No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961)). The majority calls this interpretation "implausible." *Id.* at 1857 n.18.

246. 395 U.S. 486 (1969).

247. *U.S. Term Limits*, 115 S. Ct. at 1889 (Thomas, J., dissenting). Thomas is correct that this was the critical question in *Powell*, but the *Powell* Court certainly implied that the clauses also denied Congress the power to impose other qualifications. *See Powell*, 395 U.S. at 540 n.75, 542.

248. *U.S. Term Limits*, 115 S. Ct. at 1890 (Thomas, J., dissenting). Thomas fails to acknowledge that state legislatures could impose a qualification that members of Congress have prior service in the state legislature, certainly creating a conflict of interest. *See* Thorsted v. Gregoire, 841 F. Supp. 1068, 1078-79 (W.D. Wash. 1994) (suggesting that possibility), *aff'd sub nom.* Thorsted v. Munro, No. 94-35222 *et seq.*, 1996 WL 39389 (9th Cir. Jan. 30, 1996).

249. *U.S. Term Limits*, 115 S. Ct. at 1892 (Thomas, J., dissenting) (citing Hills, *supra* note 64, at 107-09). To Thomas, term limits apparently function as no more than a "blind primary," where a state's voters exclude all future candidates with certain periods of incumbency, and include all others, without knowing who fits into either category.

250. Prior to the Seventeenth Amendment, which provided for direct election of senators,

returned on expiration of his term.[251] Moreover, Thomas argues, the fact that the people enacted Amendment 73 is anomalous to the notion that it violates "democratic principles," even if the Framers intended to bar state legislatures from imposing new qualifications.[252]

Finally, Thomas attacks in five parts the majority's conclusion that history dictates the exclusivity of the Qualifications Clauses.[253] First, at the Constitutional Convention, a Committee of Detail draft of what became the House Qualifications Clause included an exclusivity provision, while the Senate version did not.[254] Because the House provision was deleted, Thomas argues, "the Committee expected neither list of qualifications to be exclusive."[255]

Second, discussing the majority's assertion that the Framers attempted to minimize state interference with federal elections through several constitutional provisions,[256] Thomas posits that while the Framers may have been wary of state legislatures imposing qualifications,[257]

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senators were chosen by the state legislatures. *Cf.* U.S. CONST. art. I, § 3, cl. 1; U.S CONST. amend. XVII.

251. *U.S. Term Limits*, 115 S. Ct. at 1892-93 (Thomas, J., dissenting). The critical difference is that a state legislature could later choose to revoke its declaration with a majority vote and then return the Senator, whereas the people of Arkansas would, months in advance, have to mount another petition drive to place a measure on the ballot rescinding Amendment 73 in order to reelect their incumbents.

252. *Id.* at 1893. This argument ignores the fact that more than half the state constitutions in this country do not permit voters to amend through initiative petitions and require some action by their state legislatures. Grover G. Norquist, *A Republican Perspective*, CAMPAIGNS & ELECTIONS, Aug. 1995, at 47; Jonathan Ferry, *Coming to Terms with Term Limits: A Summary of State Term Limit Laws*, Dec. 1994, *available on* Congressional and State Term Limits Homepage of the Internet at http://www.termlimits.org/statelaws.shtml. Thus, to Thomas, "democratic principles" permits people in half the country to impose congressional term limits, but denies it to the other half. *See also U.S. Term Limits*, 115 S. Ct. at 1856 (majority opinion) (quoting THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961) ("The qualifications of the elected, being less carefully and properly defined *by the State constitutions, . . . have been very properly considered and regulated by the convention.*")) (emphasis added).

253. *U.S. Term Limits*, 115 S. Ct. at 1894-1909 (Thomas, J., dissenting).

254. *Id.* at 1895. This provision required that members of the House of Delegates be citizens age 25 or older " 'and any person possessing these qualifications may be elected except [blank space].' " *Id.* (quoting W. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787, p. II (1900)).

255. *Id.* The majority counters with two points: First, that the Committee's views do not indicate how the convention viewed the eventual provision; and second, that the clause was likely deleted as superfluous because of the *expressio unis est expressio alterius* maxim. *Id.* at 1860 n.27 (majority opinion). With regard to the Senate provision, the majority discounts Thomas' argument because senators were not to be chosen by popular election. *Id.*

256. *See supra* notes 155-58 and accompanying text.

257. The majority does not recognize the potential distinction between an act of the people of a state and their legislature. *U.S. Term Limits*, 115 S. Ct. at 1858 n.19. "We are aware of no case that would even suggest that the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people. . . ." *Id.*

Assuming Amendment 73 were to be deemed an election law as opposed to a qualification,

they may have embraced the concept of letting the people do so.[258] Although the Constitution provides that the federal government pay members of Congress,[259] Thomas argues that this was merely to prevent a form of recall that would have allowed the states to diminish compensation as punishment, which "would be inconsistent with the notion that Congress was a national legislature once it assembled."[260] Thomas also dismisses the majority's argument that the Framers intended to supplant

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there appears to be an issue to be considered. The Elections Clause reads that regulations shall be made in each state "by the *Legislature* thereof", U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Of course, the people enacted Amendment 73 through initiative. *Hill*, 872 S.W.2d at 351. The author has not previously seen this admittedly strict textual argument advanced. In its Supreme Court brief, U.S. Term Limits, Inc. claimed that "The phrase 'by the Legislature thereof' has long been construed to include initiatives, constitutional provisions, and other state methods of making laws." Brief for Petitioners U.S. Term Limits, Inc., *et al.*, at 9 n.6, *U.S. Term Limits* (Nos. 93-1456 and 93-128) (citing Smiley v. Holm, 285 U.S. 355, 372 (1932) and Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569-70 (1916)).

These cases do not completely support U.S. Term Limits, Inc.'s proposition; however, they do complicate the author's textual argument set forth above. *Smiley* concerned whether the word "Legislature" in Article I, § 4 included executive approval for state legislative acts. 285 U.S. at 365. The Minnesota legislature passed a congressional redistricting act that the governor vetoed. *Id.* at 361. The Court first held that the term "Legislature" was intended to mean that body in its lawmaking function. *Id.* at 365-66. Second, the Court held that because the executive veto was generally understood to be part of a state's lawmaking process at the time the U.S. Constitution was adopted (although used by only a handful of states) and was required by the state's constitution, executive approval was required for the redistricting legislation. Thus, the term "Legislature" included executive approval. *Id.* at 368-73. Yet *Smiley* is distinguishable on two points: 1) Amendment 73 is a state constitutional amendment, not a law enacted by a legislature in its lawmaking function; and 2) Unlike the executive veto, the pure initiative process was not available to citizens in any state at the time the U.S. Constitution was adopted. In the time surrounding ratification of the U.S. Constitution, no state allowed its citizens to directly amend their constitution, although Georgia from 1777 to 1789 allowed the people to petition the assembly to call a constitutional convention. *See* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAW OF THE UNITED STATES (2d ed., Ben P. Poore, ed., 1878) (collecting these state constitutions).

Hildebrant concerned whether a referendum rejecting an Ohio redistricting law was constitutional under the Elections Clause as not being an act by the Legislature. 241 U.S. at 569. The Court upheld the rejection by referendum because a federal statute authorized the states to redistrict "by the laws thereof," *id.* at 568, and because the state constitution rested legislative power in the people by referendum. *Id.* at 567-68. *Hildebrant* is distinguishable because: 1) Congress has passed no law authorizing states to enact term or ballot access limitations; and 2) Amendment 73 is not the product of a lawmaking power. *See Hill*, 872 S.W.2d at 355:

> The lawmaking power given to the people to propose and adopt laws by initiative petition was intended to supplement existing legislative authority. . . . That power . . . is not involved in the case before us. Here, we are concerned with an initiative petition to amend the Arkansas Constitution, which is a separate matter altogether.

258. *U.S. Term Limits*, 115 S. Ct. at 1896 (Thomas, J., dissenting).

259. U.S. CONST. art. I, § 6, cl. 1.

260. *U.S. Term Limits*, 115 S. Ct. at 1896 (Thomas, J., dissenting). Thomas' prior arguments would suggest he believes that the recall would be a reserved power possessed by the states, because the Constitution does not expressly deny it to them. *See supra* notes 216-23 and accompanying text. The original Virginia Plan included a recall provision with the House rotation provision, but it was also deleted. 1 *id.* at 143; 5 *id.* at 137.

state authority to legislate with regard to members of Congress by fixing voter qualifications,[261] resting authority in each house to judge its members' qualifications,[262] and permitting Congress to "make or alter" the states' congressional election laws under the Elections Clause.[263]

Third, Thomas picks two fights with the majority's opinion on the ratification debates. First, he discards the majority's seemingly compelling argument that the absence of suggestion during the debates that states could impose rotation requirements demonstrates a general understanding that the Constitution denied it to them, noting that historical records are incomplete.[264] Second, acknowledging Madison's statement that but for the Qualifications Clauses, service in the House was open to all,[265] Thomas still argues he cannot infer that Madison meant that states were denied the power to go further.[266]

Fourth, Thomas describes at great length qualifications for Congress that states passed shortly after ratification of the Constitution, including Virginia's property requirement and House district residency requirements of five states.[267] This suggests to Thomas that America was in disagreement over state power to impose requirements for congressional office, and therefore history does not support the majority's

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261. Thomas argues that the Framers were merely stating that "Representatives from each state are to be chosen by the State's voters. . . ." *U.S. Term Limits*, 115 S. Ct. at 1896-97 (Thomas, J., dissenting).

262. U.S. CONST. art. I, § 5, cl. 1. Thomas first suggests that the qualifications to be judged under this section refer only to those in the Qualifications Clauses, not any subsequent state requirements. Alternatively, he argues that because Congress would have to look to state law to judge the "Elections and Returns" of its members under Article I, § 5, it could also look to state law to judge its members qualifications. *U.S. Term Limits*, 115 S. Ct. at 1897-98 (Thomas, J., dissenting).

263. U.S. CONST. art. I, § 4, cl. 1. Thomas makes the bizarre argument that although Congress may not impose qualifications on itself, the states may, and Congress' "make or alter" power extends only towards nullifying state qualifications, not imposing its own. *U.S. Term Limits*, 115 S. Ct. at 1898-1900.

264. *U.S. Term Limits*, 115 S. Ct. at 1900-01 (Thomas, J., dissenting).

265. *See supra* note 140.

266. *U.S. Term Limits*, 115 S. Ct. at 1901-03 (Thomas, J., dissenting).

267. *Id.* at 1903-08. The majority acknowledged Virginia's property requirement, *see supra* note 163, but dismissed the district residency requirements as perhaps a "necessary analog to state residency requirements." *Id.* at 1866 n.41 (majority opinion); *see supra* note 185. Additionally, the majority thought that the limited number of congressional qualifications effected by states, in light of the "array" of qualifications for the state legislatures, evidenced the states' belief that they did not have the power to set qualifications. *Id.*

Of course, the House in 1807 decided not to ruffle Maryland's feathers by avoiding declaring that state's district residency law invalid and instead seating William McCreery without comment. *See supra* notes 136, 162. It may well be that Congress did not challenge these laws for fear of upsetting the states so early on under the new constitution. Thomas himself suggests this explanation, noting that some in Virginia feared such a confrontation were Madison to run for Congress outside of his district. *U.S. Term Limits*, 115 S. Ct. at 1904 n.32 (Thomas, J., dissenting) (quoting 11 THE PAPERS OF JAMES MADISON 378-79 (R. Rutland & C. Hobson eds., 1977)).

claim.[268]

Finally, Thomas agrees with the majority that congressional practice in qualifications conflicts has lacked uniformity.[269] But whereas the majority interprets this as an absence of general understanding that states may impose qualifications, Thomas views it as an absence of understanding that they *may not*,[270] once again raising the question of who carries the burden of proof.

3. THE ULTIMATE SAVIOR OF AMENDMENT 73

Concluding that he has sufficiently dismantled the majority's arguments, Thomas turns to the specific provision at issue: Amendment 73's ballot access limitation.[271] Thomas accepts the measure on its face, concluding that because Amendment 73 does not bar anyone from serving in Congress, it cannot amount to a qualification.[272]

Nonetheless, Thomas addresses the majority's claim that because Amendment 73 restricts affected incumbents to write-in candidacies, it would be a qualification in practice. First, Thomas assumes that popular congressional incumbents may be reelected by write-in votes.[273] The majority, by dismissing this possibility, "never adequately explains how it can take this position and still reach its conclusion."[274] Second, he disputes the majority's decision that Amendment 73's congressional ballot access provision was intended to work as a pure term limitation.[275] Instead, Thomas adopts the petitioners' claim that Amendment 73 was enacted merely to "level the playing field" on which incumbents and

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268. *U.S. Term Limits*, 115 S. Ct. at 1903-08 (Thomas, J., dissenting). Conceding some states had term limits for state officers, Thomas argues that the states did not attempt to impose them upon their members of Congress because rotation was then disfavored as a policy. *Id.* at 1906.

269. *Id.* at 1908.

270. *Id.* at 1908-09. Thomas highlights the 1807 McCreery episode, noting that the House rejected resolutions that would have expressly signaled that it thought Maryland's district residency requirement was void, *id.* at 1908 (citing 17 ANNALS OF CONG. 1231, 1237 (1807)), as evidencing Congress' division on state authority to impose additional qualifications. *Id.* at 1909.

271. *Id.* Thomas pronounces the majority's decision "radical," not only because it prohibits the states from imposing congressional term limits, but because it necessarily invalidates various state laws restricting mental incompetents, prisoners, those convicted of vote fraud, and those ineligible to vote from running for Congress. *Id.* Lower courts, however, have struck down such laws in the past as violative of the Qualifications Clauses. *See, e.g.*, Danielson v. Fitzsimmons, 44 N.W.2d 484 (Minn. 1950) (invalidating a law barring felons from running for Congress).

272. *U.S. Term Limits*, 115 S. Ct. at 1909 (Thomas, J., dissenting).

273. *Id.* at 1910 (noting most write-in campaigns are run by unpopular candidates, but attempts by "well-known and well-funded" candidates fare better).

274. *Id.*

275. *Id.* at 1911. Thomas attacks the majority for citing the *Hill* plurality's interpretation that Amendment 73 was intended as a qualification. He states that intent in such a case is irrelevant, and further notes that determining the true legislative intent would be nearly impossible when the "legislative body" "consists of 825,162 Arkansas voters." *Id.*

challengers wage congressional campaigns.[276] Amazingly, Thomas argues (perhaps sarcastically) that if Amendment 73's ballot access provision is unconstitutional, then so is the present political system that allows the uneven playing field.[277]

In conclusion, Thomas argues that Amendment 73 should be analyzed under the First and Fourteenth Amendments, as are other laws "that allegedly have the purpose and effect of handicapping a particular class of candidates."[278] To do otherwise, he suggests, would lead to viable suits challenging campaign finance laws and redistricting in favor of incumbents as placing candidates under "significant disadvantages," similar to those imposed by Amendment 73.[279]

V. COMMENTS

A. *The Strength and Vitality of* U.S. Term Limits

The clashing perspectives borne out in *U.S. Term Limits* indicate the deep line of demarcation for future federalism and political reform cases, as the state and federal governments see their responsibilities and the electorate's expectations evolve. The next appointment to the Court will have great impact the near-term resolution of these differences.

As for the evaluations of Amendment 73 specifically, Justice Stevens' opinion appears to be the better reasoned approach. Burdens on congressional incumbents, be they pure term limitations or denials of ballot access, would indeed work a profound change in the structure of American representative democracy. Although public support for limited terms at all levels of government is strong, one must question if the public has embraced it as a sound reform after sufficient reflection—as it should with such a monumentus alteration of our constitutional arrangement—or if we are instead witnessing a knee-jerk reaction to the well founded anger with Congress' recent failures to perform as we expect from our national legislative body.

Earlier this century, Justice Louis Brandeis opined that "[s]ince

276. *Id.* Thomas describes the benefits incumbents have in campaigns, from franking privileges to campaign financing advantages, *id.* at 1911-12, all of which "the voters of Arkansas evidently believe" significantly contribute to a nearly 90% reelection rate for incumbents. *Id.* at 1912 (citing Lloyd N. Cutler, *Now is the Time for All Good Men . . .*, 30 WM. & MARY L. REV. 387, 395 (1989)). The majority finds this argument "wholly unpersuasive," and says it is "obvious" that the purpose of Amendment 73 was to limit congressional terms. *Id.* at 1871. One might ask if Arkansans sought merely to "level the playing field," and were not attempting to evade the Qualifications Clauses, why they strictly limited the terms of state officials, instead of passing identical "ballot access limits" for those incumbents as well.

277. *Id.* at 1913 (Thomas, J., dissenting).

278. *Id.*

279. *Id.*

government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation."[280] Right or wrong, *U.S. Term Limits* affords the people of the United States the opportunity to consider anew the necessity of limiting congressional terms. Those favoring the idea behind Amendment 73 have not given up their attempts to impose some form of term limitation without resorting to the difficult constitutional amendment process.[281] But should an amendment be proposed, one hopes Congress will present it to the people in state ratification conventions, rather than to the legislatures, so that those voting will reflect on the importance of what they are considering, and that should they ratify, they will be rejecting the Framers' reasoned wisdom in rejecting term limits two centuries ago.

U.S. Term Limits is a watershed case not only because it invalidates a popular grass-roots reform effort, but because it also calls upon the citizenry to search deeply for what it seeks and why.

B. *Constitutional, Political, and Practical Implications of* U.S. Term Limits *on the Term Limits Movement*

Although the respondents in *U.S. Term Limits* originally had challenged the state legislative term limits imposed by Amendment 73 in the courts below,[282] the only issue before the Court was the constitutionality of the amendment's congressional ballot access limits. *U.S. Term Limits* does nothing on its face to affect Amendment 73's state legislative provisions, nor similar ones in twenty other states.[283] Here the states are free to, in the words of Justice Brandeis, "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[284]

It is too early to determine how term limitations will impact state

280. Truax v. Corrigan, 257 U.S. 312, 357 (1921) (Brandeis, J., dissenting).

281. To cite two examples, Senator Hank Brown of Colorado suggests that state laws defining state residency be changed so that anyone out of the state for more than six months a year for twelve consecutive years would not satisfy Article I's state residency requirement, which would facially exclude congressional incumbents who spend most of their time in Washington, D.C. Karen Hosler, *Backers of Term Limits Vow to Seek Amendment*, BALTIMORE SUN, May 23, 1995, at 11A. U.S. Term Limits, Inc. plans to try to require candidates to include their positions on term limits on the ballot next to their names, then encourage voters to reject those opposed to limits. A similar effort prior to the 17th Amendment helped lead to the popular election of Senators. Michael Griffin, *Court Rejects U.S. Term Limits; Backers Plan New Strategies to Restrict Incumbents*, FORT LAUDERDALE SUN-SENTINEL, May 23, 1994, at 1A.

282. *Hill*, 872 S.W.2d at 352, 359.

283. *Term Limit Foes*, *supra* note 199; *see also supra* note 199, noting potential First and Fourteenth Amendment concerns.

284. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

government, since the first measures were passed only a few years ago.[285] How these limits work, together with an expected high turnover in Congress this November,[286] could profoundly impact whether the drive to amend the Constitution to limit congressional terms succeeds or fails. Or perhaps public pressure on congressional and state legislative candidates to vote for a constitutional amendment or petition for a constitutional convention, respectively, may result in limited federal terms before their impact on the state legislatures can be fully assessed. Limited terms in modern government are indeed an experiment and their long-term ramifications remain unknown.[287]

Anything but a brief reference to the potential implications of congressional term limits is beyond the scope of this Note; these have been extensively considered elsewhere. Some of those suggested include an undermining of Congress' independence, a corresponding increased deference to the executive branch, interest groups, and congressional staff,[288] and the creation of a Congress of perpetual first-term lame ducks.[289] The impact of such measures could reach beyond the Congress itself. One commentator has suggested that term limits will lead to

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285. For example, California voters imposed term limits on their legislature in 1990. *See* CAL. CONST. art. IV, § 2(a). Of the first 27 new legislators elected after term limits were imposed, some acted just as their predecessors had, contacting lobbyists and beginning fundraising efforts within weeks. Jerry Gillam, *Term Limits Put Assembly 27 on Bipartisan Path*, L.A. TIMES, Mar. 15, 1993, at A1. A recent examination of the California Legislature found some improvement, but concluded "the initial results have not been encouraging," as legislative business has slowed and distracting special elections abound. Dan Walters, *Term Limits at Halfway Point*, SACRAMENTO BEE, May 28, 1995, at A3. *See also The Abiding Importance Of Term-Limits Ruling*, SAN FRANCISCO CHRONICLE, May 24, 1995, at A22 (describing California legislators as "seat-warmers climbing over each other" to run for the other legislative house or to move to a "cushy statewide office"). *But see* John C. Armor, *"Foreshadowing" Effects of Term Limits: California's Example for Congress*, Dec. 18, 1995, *available on* Congressional and State Term Limits Homepage of the Internet at http://www.termlimits.org/calexample.shtml (praising the overall impact term limits have had on the California Legislature).

286. As of March 6, 1996, 41 members of the House and 13 senators have announced their retirements, a figure unmatched this century in the Senate. *See* Robert Green, *Rep. Enid Waldholtz to Leave Congress to Clear Name*, Reuters North American Wire, March 5, 1996, *available in* LEXIS, Top News Library, 2week file; Brigid Schulte, *Will the Last Person Leaving Congress . . . Please Turn out the Lights*, MIAMI HERALD, Dec. 18 1995, at C1.

287. For example, the 22nd Amendment of the Constitution, limiting presidents to two terms, arguably has been inconsequential. The only two Presidents who have served two full terms since it was ratified, Dwight Eisenhower and Ronald Reagan, both were of increased age at the end of their administrations and unlikely to seek a third term. The amendment's only apparent effect was a decrease in their influence with Congress near the end of their second terms. SUNDQUIST, *supra* note 47, at 175-76.

288. *See, e.g.*, Corwin, *supra* note 73, at 600-03; Willie L. Brown, Jr., *Legislative Term Limits: Altering the Balance of Power*, 7 J. L. & POL. 747, 751-52 (1991).

289. Corwin, *supra* note 73, at 601-02; Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477, 481-83 (1992).

minority vote dilution.[290]

There are also numerous valid arguments in support of limited congressional terms.[291] Agreement is widespread that Congress has often neglected its responsibility in recent years. It might rightly be suggested, however, that the arguments for or against limiting congressional terms pale in comparison to one overall observation: Congress has gone astray precisely because the electorate has allowed it to. The power to effect change lies now, as it always has, with the people and their ballots. In the final analysis, if Congress has failed America, the ultimate fault lies at the feet of the voters. Imposing term limitations on its membership is no more likely to solve these problems than would denying suffrage to those who elected its members in the first place.

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290. Anthony E. Gay, Comment, *Congressional Term Limits: Good Government or Minority Vote Dilution?*, 141 U. PA. L. REV. 2311 (1993).

291. *See generally* COYNE & FUND, *supra* note 17; WILL, *supra* note 44.